TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 48.

THE MECHANICAL APPLIANCE COMPANY, PLAINTIFF IN ERROR,

vs.

BENJAMIN T. CASTLEMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JANUARY 4, 1908.

(20,956.)

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1 The United States of America to Benjamin T. Castleman, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, D. C., thirty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein The Mechanical Appliance Company (a corporation) — plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable David P. Dyer, Judge of the Circuit Court of the United States for the Eastern District of Missouri, this ninth day of December, in the year of our Lord one thousand nine hundred and seven.

DAVID P. DYER,
United States District Judge for the Eastern District of Missouri.

Service of the foregoing Citation is hereby acknowledged this ninth day of December, A. D. 1907.

RASSIEUR, SCHNURMACHER & RASSIEUR,
Attorneys for Plaintiff (Defendant in Error).

B. SCHNURMACHER,
Of Counsel.

2 [Endorsed:] No. 5409. United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. Benjamin T. Castleman *vs.* The Mechanical Appliance Company. Citation. Filed 9th day of December, 1907. James R. Gray, Clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the September Term 1907 *Term, 189–*, thereof, between Benjamin T. Castleman, plaintiff, and The Mechanical Appliance Company, (a corporation), defendant, a manifest error hath happened, to the great damage of the said defendant as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, and filed in the office of the Clerk of the Supreme Court of the United States, on or before thirty days from and after the date of the Citation, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this ninth day of December, in the year of our Lord one thousand nine hundred and seven.

Issued at office in the City of St. Louis, with the seal of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.]

JAMES R. GRAY,
Clerk Circuit Court United States, Eastern Division of the Eastern Judicial District of Missouri,
By IRVINE MITCHELL, *Deputy.*

Allowed by
DAVID P. DYER, *Judge.*

4 [Endorsed:] No. 5409. United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri Benjamin T. Castleman *vs.* The Mechanical Appliance Co. Writ of Error to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. Filed Dec. 9, 1907. James R. Gray, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of St. Louis, this second day of January, A. D. 1908.

[Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.]

JAMES R. GRAY,
Clerk of said Court,
By IRVINE MITCHELL,
Deputy Clerk.

5 UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

In the Circuit Court of the United States in and for the Division and District Aforesaid.

Be it remembered: that heretofore to-wit: on the 11th day of February, A. D. 1907, there was filed in the office of the Clerk of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, a transcript of proceedings from the Circuit Court, City of St. Louis, wherein Benjamin T. Castleman is plaintiff, and The Mechanical Appliance Company is defendant, which said transcript is in words and figures as follows, to-wit:

(*Transcript.*)

STATE OF MISSOURI,
City of St. Louis, ss:

Be it remembered, that heretofore, to-wit: on the 28th day of January, A. D. 1906, there was filed in the office of the Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, a petition in cause No. 44250, series A. of the causes in said Court, wherein Benjamin T. Castleman, is plaintiff and the Mechanical Appliance Company, is defendant.

The said petition is in words and figures as follows, to-wit:

In the Circuit Court of the City of St. Louis, December Term, 1906.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, a Corporation, Defendant.

6 Plaintiff states that defendant is, and at all the times herein stated was, a corporation, duly organized, created and existing under the laws of the State of Wisconsin, and doing business in the State of Missouri, having its business office in the City of St. Louis in said State.

Plaintiff further states that heretofore, to-wit: on the 2nd day of April, 1906, at the City of St. Louis aforesaid, plaintiff and defendant entered into a contract, in writing, of that date, which contract was entered into in duplicate copies, one copy thereof being retained by plaintiff and one copy thereof being retained by defendant, whereby defendant agreed to furnish plaintiff securely boxed and delivered to plaintiff free on board cars at Milwaukee, Wis., one hundred special massage motors, complete with handle, cord, plug and push-switch in handle.

Defendant agreed that said motors should be designed for operation on either a direct current or alternating current, or both, or

that a part thereof should be designed to operate on both the alternating current and direct current and part should be designed to operate on the direct current only; each machine to be marked with name, voltage, current and serial number.

That said defendant further agreed to ship the first ten motors or machines of said one hundred within forty-five days from said 2nd day of April, 1906, and to complete said entire contract, that is, to furnish the entire one hundred motors or machines, within sixty days from said 2nd day of April, 1906, and thereupon to hold the same subject to the orders of plaintiff for delivery. That defendant agreed that the mechanical design of said motors or machines should be in accordance with a certain sample machine, except that the sliding bearing thereof, with which the stroke is adjusted, should be made tapering.

Plaintiff states that defendant agreed to furnish all of said machines or motors to plaintiff for the net sum of $12.50, or, altogether, for the sum of Twelve hundred and fifty Dollars,
7 ($1250.00); that plaintiff agreed to pay to defendant the sum of $365.00 cash in advance to cover the cost to defendant of certain special tools, dies, and the like, required to manufacture said motors, and agreed, further, to pay twenty-five per cent. of each order in cash and the balance, or $9.37½, on each machine, on a sight draft drawn by defendant on plaintiff against any bill of lading which it might forward for said machines.

Plaintiff states that he has fully complied with all the terms and provisions of said agreement or contract, by him assumed and that he has paid defendant the sum of $365.00 in cash to cover the cost of special tools, dies and the like and has also paid to defendant the sum of $312.50, being twenty-five per cent.. in cash, of the costs of said one hundred motors, or machines; making, together, the amount of $677.50 heretofore paid in cash by plaintiff to defendant.

That defendant, on the other hand, though receiving from plaintiff the said cash payments, and though retaining the same, has wholly neglected, failed and refused to carry out said agreement or contract on its part and has neglected, failed and refused to furnish plaintiff with any of said machines or motors, although plaintiff has demanded the same of defendant.

That more than sixty days has elapsed since said 2nd day of April, 1906, and that said defendant has wholly defaulted in carrying out all of the terms and provisions of said contract by it undertaken and assumed.

That by reason of the premises, plaintiff has been damaged in the sum of Six hundred and seventy-seven and 50/100 Dollars, ($677.50), the amount of cash paid by him to defendant and retained by it, and has also been damaged in the sum of Seventeen hundred and fifty Dollars ($1750.00) by the failure and refusal of defendant to deliver to him the said one hundred motors or machines which it agreed to deliver him not later than sixty days from and after said 2nd day of April, 1906; making, together, a damage of Twenty-four hundred and twenty-seven and 50/100 Dol-
8 lars ($2427.50) suffered by plaintiff by reason of defendant's said breach of contract.

Wherefore, plaintiff prays judgment against defendant for said sum of Twenty-four hundred and twenty-seven and 50/100 Dollars ($2427.50), together with interest and his costs.

By RASSIEUR, SCHNURMACHER & RASSIEUR,
Attorneys for Plaintiff.

Upon the filing of the said petition, a writ of summons for the defendant, was issued by the Clerk of the said Court, to the Sheriff of the City of St. Louis.

The said writ, together with the return of said Sheriff thereon, are respectively in words and figures as follows, to-wit:

STATE OF MISSOURI,
City of St. Louis, ss:

The State of Missouri to the Sheriff of the City of St. Louis, Greeting:

We command you to summon The Mechanical Appliance Company, a corporation, to appear before the Judges of our Circuit Court, on the first day of the next term thereof, to be held in the City of St. Louis, at the Court House in said City, on the first Monday, of February next, then and there to answer the complaint of Benjamin T. Castleman, as set forth in the annexed petition; and have you then and there this writ.

Witness, William H. Hauschulte, Clerk of our said Court, with the seal thereof hereto affixed, at office in the City of St. Louis, this 28th day of December, in the year of our Lord nineteen hundred and six.

[SEAL.] WM. H. HAUSCHULTE, *Clerk.*

9 Served this writ at the City of St. Louis, Missouri, on the within named defendant the Mechanical Appliance Company (A corporation) this 29th day of December, 1906, by delivering a copy of the writ and petition as furnished by the Clerk to Dudley Shaw, Agent of the said defendant Corporation, he being in said defendant's usual business office and in charge thereof. The President or other Chief Officer of said Defendant could not be found in the City of St. Louis at the time of service.

PATRICK H. CLARKE, *Sheriff,*
By JNO. EHRHARDT, *Deputy.*

Fee $1.00.

And at the December Term, 1906, of said Court, the following proceedings were had in said cause, to-wit:

MONDAY, *January* 21*st*, 1907.

44250.

BENJAMIN T. CASTLEMAN
vs.
THE MECHANICAL APPLIANCE COMPANY.

Now at this day, comes the defendant by attorneys, and files a petition duly verified by affidavit, praying for the removal of this cause to the Circuit Court of the United States, and also files herein its bond, conditioned according to law in the sum of Five Hundred Dollars. And the Court having heard and duly considered the said petition, doth approve said bond, and doth order that the Clerk of this Court, forthwith certify to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, a transcript of the record and proceedings in this cause as fully as the same remain on file and of record in this Court.

The said petition and bond, are respectively in words and figures as follows, to-wit:

In the Circuit Court of the City of St. Louis, December Term, 1906.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, a Corporation, Defendant.

10 The petition of the Mechanical Appliance Company, a corporation, Defendant in the above entitled action, respectfully shows to the Court:—

That your petitioner is the defendant in the above entitled action, and that said action has been commenced against it in said Court by said plaintiff, and that said action is of a civil nature.

That said Plaintiff in his Petition herein, claims in substance, that on or about the second day of April, 1906, the Plaintiff and Defendant entered into a contract, whereby it is alleged this Defendant agreed to furnish Plaintiff certain merchandise described in said Petition, and that this Defendant has committed sundry breaches of said contract, and that thereby, this Plaintiff has been damaged in the sum of Two Thousand Four Hundred Twenty-seven and 50/100 Dollars ($2427.50), for which Plaintiff prays judgment against this Defendant.

That your Petitioner disputes said claim and denies all liability under the contract set out in the Petition herein; and also denies the validity of the service herein.

That the matter in dispute in this action exceeds the sum of Two Thousand Dollars ($2000), exclusive of interest and costs. That the controversy in this action and every issue of fact and law therein is wholly between citizens of different States, and which can be fully determined as between them, that is to say, the Plaintiff, Benjamin T. Castleman, is now and was at the time of the filing of

this Petition in this cause, a citizen of the City of St. Louis, State of Missouri, and resident thereof, and the Defendant, The Mechanical Appliance Company was then and still is, a corporation, organized under the laws of the State of Michigan, with its chief office in the City of Milwaukee, State of *Michigan*, and a citizen thereof.

11 That the time for your petitioner, as Defendant in this action, to answer or plead to the Petition in said action, has not yet expired and will not so expire until February 6th, 1907, and that your Petitioner has not yet filed or in any way appeared therein.

Your petitioner herewith presents a good and sufficient bond, as provided by the Statutes in such cases, that it will, on or before the first day of the next ensuing session of the United States Circuit Court for the Eastern Division of the Eastern District of Missouri, file therein a transcript of the records of this action, and for the payment of all costs which may be awarded by said Court, if the said Circuit Court shall hold that this suit was wrongfully or improperly removed thereto.

Your Petitioner therefore, prays that this Court proceed no further herein, except to make the order of removal, as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made by said Court as provided by law, and as in duty bound, your Petitioner will ever pray.

LEE W. GRANT.
PIERRE B. KENNEDY.

STATE OF MISSOURI,
City of St. Louis:

Pierre B. Kennedy, being first duly sworn, states on oath that he is one of the Attorneys of the Defendant in the above entitled cause and of the petitioner named in the foregoing petition; that he has read the same and believes the same to be true; and affiant further says that said Petitioner is absent from and is a non-resident of the City of St. Louis, State of Missouri, in which said suit is brought, and that affiant makes this affidavit for the reason that Defendant is absent from, and is a non-resident of said City of St. Louis, in which said suit is brought.

PIERRE B. KENNEDY.

12 Subscribed and sworn to before me, this 19th day of January, 1907.

[SEAL.]

JNO. B. CARROLL,
Notary Public.

My term expires May 22, 1909.

STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court of the City of St. Louis, December Term, 1906.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, a Corporation, Defendant.

Know all men by these presents, that we, the Mechanical Appliance Company, as Principal, and The United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Benjamin T. Castleman, Plaintiff in the above entitled cause, its successors and assigns, in the sum of Five Hundred ($500.00) Dollars lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, and each of us, our heirs, executors, and administrators, jointly and severally, by these presents.

The conditions of this obligation are such that:

Whereas, the said Mechanical Appliance Company has applied by petition to the Circuit Court of the State of Missouri, in and for the City of St. Louis, for the removal of a certain cause therein pending wherein Benjamin T. Castleman is Plaintiff and the said The Mechanical Appliance Company is Defendant, to the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, for further proceedings on grounds in the said petition set forth, and that all further proceedings in said action in
13 said Circuit Court be stayed.

Now, therefore, if your Petitioner, the said The Mechanical Appliance Company shall enter in said Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, aforesaid, on or before the first day of the next regular session, a copy of the records in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, shall remain in full force and effect.

Witness, our hands and seals this 19th day of January, 1907.

THE MECHANICAL APPLIANCE COMPANY,
By LOUIS ALLIS, *President.*

[SEAL.]

THE UNITED STATES FIDELITY & GUARANTY CO.,
By NOEL L. ROBYN, *Attorney in Fact.*

Approved in open Court this 21st day of January, 1907.

FRED. H. KREISMANN, *Clerk.*

STATE OF MISSOURI,
City of St. Louis, ss:

I, Fred H. Kreismann, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, do certify that the above and foregoing, contains a true, full and complete transcript of the record and proceedings in the above entitled cause, (including the petition and bond for removal, and the order for removal) of said cause, as fully as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis, this the twenty-eighth day of January, 1907.

FRED. H. KREISMANN,
Clerk, Circuit Court.

14 And afterwards to-wit: on the 29th day of May the following among other proceedings were had and appear of record in said cause to-wit:

(*Term Bill of Exceptions Allowed and Signed.*)

5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE CO., Defendant.

Now at this day comes said defendant by attorney and presents to the Court its Bill of Exceptions for the present term in this cause, which said Bill of Exceptions is signed by the Judge and ordered filed and allowed of record herein.

Which said Term Bill of Exceptions is in words and figures as follows, to-wit:

(*Term Bill of Exceptions.*)

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, March Term, 1907.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Be it remembered, that on the 25th day of May, 1907, defendant, by leave of the Court, and consent of counsel for plaintiff, withdrew its motion to quash summons and withdrew affidavits of F. H. Petrie and Dudley Shaw, in support thereof, and filed its plea to the jurisdiction of the court, which plea in words and figures, is as follows:

15 In the United States Circuit Court for the Eastern Division of the Eastern District of Missouri, March Term, 1907.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Now comes the defendant in the above entitled cause and enters its appearance herein for the purpose only of this motion and to object to the jurisdiction of this court over it, and for its plea to the jurisdiction, states:

1. That it is a corporation, organized under the laws of the State of Wisconsin, that it has never taken out a license to do business in the State of Missouri, and that at the time of the alleged service of the writ of summons herein as set out in the return of the Sheriff, to-wit, 29th day of December, 1906, the defendant did not have any agent, office or place of business in the City of St. Louis or in the State of Missouri.

2. That the person upon whom service was attempted to be had by the Sheriff, and to whom a copy of the summons and petition was delivered, towit, Dudley Shaw, was not and had not been for sometime prior thereto an officer, agent or employee of this defendant. That said Dudley Shaw was not, at the time of the delivery of the summons herein to him by the Sheriff, in charge of defendant's usual business office, or in defendant's usual business office in the City of St. Louis for the reason that this defendant had, at said time, no business office nor any other office in the City of St. Louis, State of Missouri.

Wherefore defendant prays that the service of summons herein may be set aside and that cause may be dismissed.

LEE W. GRANT &
P. B. KENNEDY,
Attorneys for Defendant.

16 And thereupon, defendant in support of said plea to the jurisdiction, filed a new affidavit of F. H. Petrie, and refiled affidavit of Dudley Shaw, which affidavits respectively are in words and figures as follows:

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

BEN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE CO., a Corp., Defendant.

STATE OF WISCONSIN,
Milwaukee County, ss:

F. H. Petrie, being first duly sworn, deposes and says that he is, and at all the times hereinafter mentioned was, one of the general officers, to-wit: the Secretary of the Mechanical Appliance Company,

a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business in the City of Milwaukee, in the State of Wisconsin.

Affiant further says that between the 21st day of July, 1905, and the 1st day of November, 1906, one Dudley Shaw, of the City of St. Louis, in the State of Missouri, was agent of the above named Mechanical Appliance Company for the sale of goods manufactured by it in the City of St. Louis, in the said State of Missouri: that there is hereto annexed, marked "Exhibit A" and made a part hereof, a copy of the contract existing between the said Mechanical Appliance Company and the said Dudley Shaw; that said contract ("Exhibit A"), was the only contract existing between the said Mechanical Appliance Company and the said Dudley Shaw and fully and
17 completely sets out all and singular the agreements between the said Mechanical Appliance Company and the said Dudley Shaw.

Affiant further says that on said 1st day of November, 1906, the said contract between the said Mechanical Appliance Company and the said Dudley Shaw was terminated by mutual consent and that since said date the said Mechanical Appliance Company has had no agent whatsoever in the City of St. Louis. That from and after said date the said Dudley Shaw ceased to represent the said Mechanical Appliance Company as an agent and since that time had and has no contract agreement or business relation whatsoever with the said Mechanical Appliance Company, except so far as a corporation known as the Dudley Shaw Company, of which, as this affiant is informed and believes, the said Dudley Shaw is an officer, has from time to time purchased goods and merchandise from the said Mechanical Appliance Company. Affiant Further says that the said Mechanical Appliance Company had never maintained an office in the City of St. Louis nor paid any expenses thereof whatsoever; that even during the time that the said Dudley Shaw was under contract with the said Mechanical Appliance Company, as shown by said Exhibit "A" the said Mechanical Appliance Company did not pay any expenses of the office of the said Dudley Shaw, nor did it maintain or have any office whatsoever in the said City of St. Louis, the sole compensation of the said Dudley Shaw being the commissions agreed to be paid to him under the provisions of said contract (Exhibit "A"). That since the termination of said contract the said Mechanical Appliance Company has not maintained any office of any kind, nature or description in said City of St. Louis, in the State of Missouri.

Further affiant saith not.

F. H. PETRIE.

18 Subscribed and sworn to before me this 27th day of March, A. D., 1907.

[SEAL.] E. E. SMYTHE,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Feb. 9th, 1908.

19 (*Affidavit of Dudley Shaw.*)

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

STATE OF MISSOURI,
City of St. Louis:

BEN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE CO., a Corp., Defendant.

Dudley Shaw, being first duly sworn, deposes and says that he is a resident of the City of St. Louis, State of Missouri, and is engaged in buying and selling machinery of numerous makes and manufacture; that he maintains an office in the City of St. Louis for the transaction of his business; that he pays the expense of that office and that none of the machine manufacturers whom he represents have any part or interest in that office. Affiant further says that among other manufacturers whose goods he handled, is the Mechanical Appliance Company, of Milwaukee, Wisconsin. That he purchases goods from this concern; all his purchases are billed direct to him and are paid for by him and he, the said Dudley Shaw, sells and bills direct to his customers. This manner of procedure has obtained since November 1, 1906, prior to said date he was handling the machinery of the Mechanical Appliance Company under a written contract with it, a copy of which contract is attached to the affidavit of F. H. Petrie, filed in this case. This contract had existed between himself and the Mechanical Appliance Company for some three or four months and under this contract, machinery was billed in most cases, direct to the affiant, and the affiant billed to other parties, the profits on such sales being affiant's compensation for the sale. In some cases affiant took orders from parties and they were
20 billed direct to the parties by the Mechanical Appliance Company.

The above mentioned contract between the affiant and the Mechanical Appliance Company was terminated by mutual consent on November 1st, 1906, and since that date all transactions between the affiant and the Mechanical Appliance Company have been purchases and sales outright, and he has had no connection with the Mechanical Appliance Company excepting buying and selling their goods. The Mechanical Appliance Company has no interest in my office, pays no part of the expenses, and as far as I know, the Mechanical Appliance Company has never maintained an office in the City of St. Louis or the State of Missouri. Further affiant sayeth not.

DUDLEY SHAW.

Subscribed and sworn to before me this 2nd day of April, A. D. 1907.

[SEAL.] PIERRE B. KENNEDY,
Notary Public.

My commission expires July 2nd, 1907.

21 EXHIBIT "A."

Agency Proposition.

The Mechanical Appliance Company hereby appoints Dudley Shaw its sole agent for the sale of its apparatus in St. Louis, Mo., East St. Louis, Ill. and vicinity.

The Company agrees to bill its machinery to the Agent at a net factory billing price, and the difference between this factory net billing price and the price at which the Agent has sold the customer shall cover in full the Agent's services, commissions and expenses, except in special cases herein otherwise provided for or otherwise specially agreed upon in writing. This net factory billing price shall be subject to change from time to time, but no raise in price will be made without the Company giving the agent thirty days' prior written notice. The terms of payment shall be thirty (30) days net, 2% cash in ten days.

Second. It is further agreed that this contract shall not affect contracts which the Company makes direct with manufacturers of various machines or tools, for furnishing electric motors and generators to said manufacturers of machines or tools for special use directly with or on same, but it is understood that the Company will not permit such manufacturers so selling their machinery in combination with this Company to offer for sale the electric machinery of this Company other than with their own and for operating the same.

Third. The agent agrees to sell the machinery of this Company to the exclusion of all other makes of like machinery of like size and horse power, and to devote so much of his time as may be necessary to promote the best interests of the Company. The agent may also sell the apparatus of the Company in open territory not covered by any other agent.

Fourth. All sales which are made by the agent under
22 this contract, in the Company's name, shall be subject to the approval of the Company at its Home Office, and shall be made on regular blank contract forms, which shall be furnished by said Company to said agent, for such use, and when said sales are completed by final payment according to terms of contract under which the machinery is sold to the purchaser, the said agent shall be credited with the amount of his commission.

Fifth. It is further und-rstood that before any orders are accepted by the Company from the agent, the agent shall make satisfactory arrangements with the Company in regard to credit, and all sales made by said agent direct to customers shall be wholly at his own risk of account, and within the requirements of the guarantee of the Company regarding its products.

Sixth. It is further mutually understood and agreed between parties hereto that either party may cancel this contract by giving thirty days' notice in writing, when all obligations hereunder may be declared cancelled except the settlement of business previously con-

summated hereunder. This agreement is to cover a period of one year unless terminated as above stated.

In witness whereof, the said The Mechanical Appliance Company has hereunto subscribed its name this 17 day of July A. D., 1905, subject to the final approval of the Company, at the home office at Milwaukee, Wisconsin, by affixing of the seal of the Company.

THE MECHANICAL APPLIANCE COMPANY,
By F. H. PETRIE.

Approved at Milwaukee, Wisconsin, this 21st day of July, A. D. 1905.

T. S. WATSON, *V. P.*

The said Agent accepts the within contract upon the terms and conditions named, and agrees to be governed thereby.

Witness his hand and seal, this — day of —— 190–.

DUDLEY SHAW. [SEAL.]

23 And plaintiff refiled the affidavit of Benjamin T. Castleman, which affidavit in words and figures, is as follows:

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

No. 5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Affidavit of Benjamin T. Castleman, Plaintiff, in Opposition to Motion of Defendant to Quash the Return of the Sheriff Herein.

STATE OF MISSOURI,
City of St. Louis, ss:

Benjamin T. Castleman, the plaintiff in the above-entitled cause, being duly sworn, makes oath and says that on and prior to the twenty-ninth day of December, 1906, the day when the sheriff of the City of St. Louis certifies, by his return upon the summons issued in this cause, that he served the same upon the defendant by delivering a copy thereof to the agent of defendant and the person in charge of its business office in the City of St. Louis, he was frequently at Room 1101 of the Chemical Building, in the City of St. Louis aforesaid, in connection with the business out of which this controversy arose.

That upon the office door leading to said room, appeared the name of the "Mechanical Appliance Company"; and that said
24 room and the adjoining room, 1102 Chemical Building, were occupied by Dudley Shaw and the Dudley Shaw Company, said Dudley Shaw representing and acting for said Mechanical Ap-

pliance Company in all negotiations which this affiant had with said Company.

Affiant further states that in Gould's Directory of the City of St. Louis for the year 1906, being a directory of the persons residing and doing business in the City of St. Louis, there appears under the letter "M" the following:

"Mechanical Appliance Co. 721 Olive."

That in the directory of the Bell Telephone Company issued in the City of St. Louis in month of January, 1907, being the month next following that during which service was made on defendant by the Sheriff of the City of St. Louis, there appears under the letter "M" the following:

"Main 1472 Mechanical Appliance Co. of Milwaukee, Wis. Dudley Shaw Co., Mgr. M'f'rs of Elect. Apparatus Chemical bg."

Affiant further states that he had correspondence with the Mechanical Appliance Company, the defendant herein, both prior to November 1, 1906, the date when, according to the affidavits of F. H. Petrie and Dudley Shaw, filed by defendant herein, it is claimed that Dudley Shaw's contract with defendant was terminated, as well as after November 1, 1906, the last of said correspondence being dated December 26, 1906, only three days prior to the service of the summons herein; and that said last mentioned letter was a letter reading as follows:

"Mr. Ben T. Castleman, City.

DEAR SIR: We are enclosing you herewith invoice covering dyes, tools, etc., which we built in order to manufacture (sic) the Massage instruments for you.

Yours very truly,

25 THE MECHANICAL APPLIANCE CO.,
DUDLEY SHAW, *Dis. Mgr.*"

And affiant states that said letter so received from defendant was on letter paper which bore printed at its head, the following:

"The Mechanical Appliance Company
Builders of
Watson
Motors and
Generators.
Factory and Main Office,
Milwaukee, Wis."

And bore upon the right of the foregoing heading, the following:

"St. Louis Office:
1101-2 Chemical Bldg.
Telephone:
Bell: Main 1472
Dudley Shaw, Manager."

Further affiant saith not.

BEN T. CASTLEMAN.

Subscribed and sworn to before me this 27th day of April, 1907. My term expires April 26th, 1909.

[SEAL.] LEO RASSIEUR, JR.,
Notary Public, City of St. Louis, Missouri.

26 And the court, having duly considered said plea to the jurisdiction, denied and over-ruled the same on the 28th day of May, 1907, on the ground that the return of the sheriff on the summons in this cause, was conclusive upon the defendant, to which action of the court, in over-ruling its plea to the jurisdiction, defendant duly excepted at the time, which exception was duly allowed by the court.

And at the same term of court, to-wit: March Term, 1907, defendant prayed on the 29th day of May, 1907, that this, its bill of exceptions, may be allowed settled and sealed.

LEE W. GRANT,
Counsel for Defendant.

Settled and allowed this 29th day of May, 1907.

DAVID P. DYER, *Judge.*

O. K.
RASSIEUR, *S. & R. for Pl'ff.*

27 And afterwards to-wit: on the 28th day of June, A. D. 1907, there were filed in said cause an answer and replication, which are respectively in words and figures as follows, to-wit:

(*Answer.*)

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, March Term, 1907.

BEN T. CASTLEMAN, Plaintiff,
vs.
MECHANICAL APPLIANCE CO., Defendant.

Now comes the defendant and expressly reserving all exceptions and objections heretofore made to the jurisdiction of the Court over this defendant, and to the rulings of the Court thereon, for answer to plaintiff's petition admits that it is a corporation duly organized and existing under the laws of the State of Wisconsin, but denies each and every other allegation in said petition contained.

For further answer defendant states that on or about the second day of April, 1906, defendant entered into a contract in writing under that date with plaintiff, whereby the defendant agreed to have manufactured for the plaintiff, 100 special massage motors and that the plaintiff agreed to pay the defendant the sum of Three Hundred Sixty Five Dollars ($365.00) cash to cover the costs of the special tools required to manufacture said motors, and also a further sum of Twelve and 50/100 Dollars ($12.50) for each of said motors so manufactured for plaintiff, and to pay 25 per cent. of said sum,

that is, $312.50, in advance of its entering upon the fulfillment of said contract. That it was further agreed between plaintiff and defendant that ten of said machines were to be delivered within
28 45 days from the approval of said contract, but that before said machines should be delivered, one complete assembled machine was to be made and submitted for the inspection and approval of said plaintiff. That it was further provided in said contract that the remaining 90 machines were to be completed within 60 days from the approval of said contract.

Defendant further states that said contract was approved and accepted and entered into by this defendant, subject to the condition however, that the fulfillment of said contract by this defendant, in whole or in part, should be contingent on strikes, accidents, or other causes beyond the control of this defendant, said condition being known to and accepted by this plaintiff. Defendant further states that said plaintiff, on account of said contract, did pay to this defendant the sum of Three Hundred Sixty Five Dollars ($365.00) to cover the costs of special tools, dies, etc. required to manufacture said machines, and also $317.50. That thereupon, this defendant entered into the performance of said contract and caused special tools, dies and the like to be made for the purpose of having said machines manufactured, and expended said sum thereby and that this defendant expended the further sum of Five Hundred Seventy Dollars ($570.00) in purchasing material and in employing labor in the manufacture of said machines, and also that this defendant did cause to be manufactured and assembled one complete machine and submitted the same for the inspection and approval of this plaintiff. That plaintiff approved said complete machine, as manufactured, but desired a mechanical change to be made in the construction of said machines, which change was made by defendant for plaintiff; that defendant, on account of strikes and other causes beyond his control, was delayed in the completion of said complete machine and in the performance of said contract, beyond the time provided in said contract therefor, but that plaintiff admitted to this defendant that said delay was not due to any fault of this de-
29 fendant, and waived any alleged default on the part of this defendant in furnishing and supplying said machines within the time provided by said contract.

Defendant further states that it has at all times since the assembling of said complete machine, been willing and anxious and has offered to proceed further in the manufacture and furnishing of said massage motors, but that plaintiff notified defendant that he would not receive or accept said machines if finished and delivered to him. That thereby, defendant has been prevented by plaintiff from proceeding further in the manufacture, finishing and delivery of said machines.

Having fully answered, defendant asks to be dismissed hence with its costs.

LEE W. GRANT,
P. B. KENNEDY,
For Defendant.

(*Reply.*)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

No. 5409.

BEN T. CASTLEMAN, Plaintiff,
vs.
MECHANICAL APPLIANCE COMPANY, Defendant.

Replication.

Now, again, comes plaintiff, and for reply to the answer of defendant herein, denies each and every allegation of new matter in said answer contained; and again prays judgment as in his petition.

By RASSIEUR, SCHNURMACHER & RASSIEUR, *His Attorneys.*

And afterwards to-wit: at the September Term A. D. 1907 of said Court the following among other proceedings were had and appear of record in said cause, to-wit:

OCTOBER 21ST, 1907.

(*Jury Empanelled.*)

5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Now at this day come the parties hereto by their respective attorneys and this cause being now regularly called for hearing comes also a jury to-wit: Watt Woolridge, F. W. Brickey, Taylor Berry, Leopold Ackerman, George Blattner, Patrick T. Whelan, Paul Brown, Henry C. Hoener, John J. Kelley, Leon Jokerst, Alexander Hamilton, Robert V. Tillman, twelve good and lawful men who having been duly drawn, summoned and chosen, are now sworn to try the issues and a true verdict render according to the law and the evidence, and now the introduction of the evidence in this cause is commenced and concluded.

OCTOBER 22ND, 1907.

(*Judgment.*)

5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Now at this day come again the parties hereto by their respective attorneys and comes also the jury heretofore empanelled and sworn herein as yesterday, and now said jury, after hearing the arguments of counsel and being duly charged by the Court, retires to consider of its verdict which it afterwards returns into Court, as follows: "We the jury find the issues joined in the above-entitled cause in favor of said plaintiff Benjamin T. Castleman, and assess his damages at the sum of $682.50, Six Hundred Eighty-Two and 50/100. Dated October 22" 1907. Paul Brown, Foreman."

31 It is therefore considered by the Court that said plaintiff have and recover of said defendant the damages so found as aforesaid, and also his costs and charges herein expended and that he have execution therefor.

NOVEMBER 1ST, 1907.

(*Defendant Allowed Time for Bill of Exceptions.*)

5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

On motion of said defendant by its attorney it is now Ordered that it be and is hereby allowed thirty days from and after this date in which time to present its bill of exceptions herein.

NOVEMBER 29TH, 1907.

5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

The Court having fully considered the motion of said defendant for a new trial in this cause doth Order that said motion be and the same is hereby overruled, and on application of said defendant by attorney the Court doth fix the amount of a supersedeas bond herein at the sum of One Thousand Dollars.

DECEMBER 3RD, 1907.

(*Bill of Exceptions Filed in Recess.*)

5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Defendant's bill of exceptions filed.

DECEMBER 7TH, 1907.

5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

The defendant, having heretofore filed its Bill of Exceptions, duly signed by the Judge in recess of the Court, this day presents said bill of exceptions in open court and the same is now duly Ordered allowed of record herein.

Which said bill of exceptions is in words and figures as follows, to-wit:

(*Bill of Exceptions.*)

32 In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Be it remembered, that heretofore, to-wit, on or about the 29th day of May, 1907, defendant filed its term bill of exceptions in this cause and the same was settled and allowed by the court, which term bill of exceptions is in words and figures, as follows:

In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri. At Law.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Bill of Exceptions.

Be it remembered, that on the 25th day of May, 1907, defendant, by leave of court, and consent of counsel for plaintiff, withdrew its motion to quash summons and withdrew affidavits of F. H. Petrie

and Dudley Shaw, in support thereof, and filed its plea to the jurisdiction of the court, which plea in words and figures, is as follows:

In the United States Circuit Court for the Eastern Division of the Eastern District of Missouri, March Term, 1907.

33 BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Now comes the defendant in the above entitled cause and enters its appearance herein for the purpose only of this motion and to object to the jurisdiction of this court over it, and for its plea to the jurisdiction, states:

1. That it is a corporation, organized under the laws of the State of Wisconsin, that it has never taken out a license to do business in the State of Missouri, and that at the time of the alleged service of the writ of summons herein as set out in the return of the Sheriff, to-wit, 29th day of December, 1905, the defendant did not have any agent, office or place of business in the City of St. Louis or in the State of Missouri.

2. That the person upon whom service was attempted to be had by the Sheriff, and to whom a copy of the summons and petition was delivered, to-wit, Dudley Shaw, was not and had not been for some time prior thereto an officer, agent or employee of this defendant. That said Dudley Shaw was not, at the time of the delivery of the copy of summons herein to him by the Sheriff, in charge of defendant's usual business office, or in defendant's usual business office in the City of St. Louis for the reason that this defendant had, at said time, no business office nor any other office in the City of St. Louis, State of Missouri.

Wherefore defendant prays that the service of summons herein may be set aside and that cause may be dismissed.

LEE W. GRANT &
P. B. KENNEDY,
Attorneys for Defendant.

34 And thereupon, defendant in support of said plea to the jurisdiction, filed a new affidavit of F. H. Petrie, and refiled affidavit of Dudley Shaw, which affidavits respectively are in words and figures as follows:

In the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

No. 5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
MECHANICAL APPLIANCE COMPANY, Defendant.

F. H. Petrie being first duly sworn, deposes and says that he is and at all times herein mentioned was one of the general officers, to wit: The Secretary of the Mechanical Appliance Company a corporation, organized and existing under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business in the City of Milwaukee, in said State of Wisconsin.

Affiant further says that between the 21st day of July 1905 and the 1st day of November 1906, one Dudley Shaw, of the City of St. Louis, in the State of Missouri, was agent of the above named Mechanical Appliance Company in the City of St. Louis, Missouri, for the sale of goods, manufactured by it; that there is hereunto annexed, marked "Exhibit A" and made a part hereof, a copy of the contract existing between said Mechanical Appliance Company and said Dudley Shaw; that said contract "Exhibit A" was the only contract existing between the said Mechanical Appliance Company and the said Dudley Shaw, and fully and completely sets out all and singular the agreement between the said Mechanical Appliance Company and the said Dudley Shaw.

35 Affiant further says that on the said 1st day of November 1906, the said contract between the said Mechanical Appliance Company and the said Dudley Shaw was terminated by mutual consent, and that since said date, the said Mechanical Appliance Company has had no agent whatsoever in the State of Missouri; that from and after said date the said Dudley Shaw ceased to represent the said Mechanical Appliance Company as an agent, and since said time had and has no contract, agreement or business relations whatsoever with the said Mechanical Appliance Company, except so far as a corporation known as the Dudley Shaw Company, of which, as this affiant is informed and believes, the said Dudley Shaw is an officer, has from time to time purchased goods and merchandise from the said Mechanical Appliance Company.

That the said Mechanical Appliance Company has never taken out a license to do business as a foreign corporation in the State of Missouri, and that at the time of the service of the summons herein, the said Mechanical Appliance Company was not engaged in doing business in said State, and had no place of business therein.

Affiant further says that the said Mechanical Appliance Company has never maintained an office in the City of St. Louis, nor paid any expenses thereof whatsoever; that even during the time that the said Dudley Shaw was under contract with the said Mechanical Appliance Company, as shown by said "Exhibit A" the said Mechanical Appliance Company did not pay any expenses of the office of the

said Dudley Shaw, nor did it maintain or have any office whatsoever in the said City of St. Louis, or in the said State of Missouri, the sole compensation of said Dudley Shaw being the commissions agreed to be paid him under the provisions of said contract, "Exhibit A"; that since the termination of said contract the said Mechanical Appliance Company has not maintained any office of any kind, nature or description in *in* said City of St. Louis, nor in said State of Missouri.

36 Affiant further says that he has read the affidavit of said Benjamin T. Castleman on file herein, in opposition to the motion to quash the return of the sheriff herein; that the said Mechanical Appliance Company never at any time authorized the insertion of its name in the directory of the Bell Telephone Company in the City of St. Louis, and never paid for telephone service in said City; that it never authorized the insertion of its name in the City Directory of the City of St. Louis for the year 1906, or in any other issue, and that it has no knowledge or information of said insertion except as it may be contained in said affidavit, but that said insertion if it was in fact made, was wholly unauthorized by the said Mechanical Appliance Company; that the said Mechanical Appliance Company never authorized the placing of its name upon the office door in the Chemical Building in the said City of St. Louis, mentioned in said affidavit, nor upon any other door, nor in any other building in said City.

Affiant further says that any letterheads or other stationery which may have been used by the said Dudley Shaw, containing the name of said Mechanical Appliance Company were secured during the existence of said contract "Exhibit A" and that the use of said letterheads and other stationery by him since the 1st day of November 1906, the date of the expiration of said contract was, and is wholly unauthorized.

Affiant further says that as such Secretary of said Mechanical Appliance Company, he has personal knowledge of the business transaction between the said Dudley Shaw and said Mechanical Appliance Company, and that the facts hereinbefore set forth are true as to his own knowledge.

That this affiant as such officer of said Mechanical Appliance Company, has fully and fairly stated the facts in said case to its counsel, and has been informed by them that the said Mechanical Appliance Company has a meritorious defense of this action.

F. H. PETRIE.

37 Subscribed and sworn to before me this 21st day of May A. D. 1907.

[SEAL.] O. F. PIHL, JR.,
Notary Public, Milwaukee, Wisconsin.

My commission expires June 23, 1907.

Exhibit A.

Agency Proposition.

The Mechanical Appliance Company hereby appoints Dudley Shaw its sole agent for the sale of its apparatus in St. Louis, Mo. East St. Louis, Ill. and vicinity.

The company agrees to bill its machinery to the agent at a net factory billing price, and the difference between this factory net billing price and the price at which the agent has sold the customer shall cover in full the Agent's services, commissions and expenses, except in special cases herein otherwise provided for or otherwise specially agreed upon in writing. This net factory billing price shall be subject to change from time to time, but no raise in price will be made without the Company giving the agent thirty days prior written notice. The terms of payment shall be thirty (30) days net, 2% cash in ten days.

Second. It is further agreed that this contract shall not effect contracts which the Company makes direct with manufacturers of various machines or tools, for furnishing electric motors and generators to said manufacturers of machine or tools for special use directly with or on same, but it is understood that the Company will not permit such manufacturers so selling their machinery in combination with this Company to offer for sale the electric machinery of this Company other than with their own and for operating the same.

Third. The Agent agrees to sell the machinery of this Company to the exclusion of all other makes of like machinery of like size and horse power, and to devote so much of his time as may be necessary to promote the best interests of the Company. The agent may also sell the apparatus of the Company in open territory not covered by any other agent.

Fourth. All sales which are made by the agent under this contract, in the Company's name, shall be subject to the ap-
38 proval of the Company at its Home Office, and shall be made on regular blank contract form, which shall be furnished by said Company to said agent, for such use, and when said sales are completed by final payment according to terms of contract under which the machinery is sold to the purchaser, the said agent shall be credited with the amount of his commission.

Fifth. It is further understood that before any orders are accepted by the Company from the agent, the agent shall make satisfactory arrangements with the Company in regard to credit, and all sales made by said agent direct to customers shall be wholly at his own risk of account, and within the requirements of the guarantee of the Company regarding its products.

Sixth. It is further mutually understood and agreed between parties hereto that either party may cancel this contract by giving thirty days' notice in writing, when all obligations hereunder may be declared cancelled except the settlement of business previously consummated hereunder. This agreement is to cover a period of one year unless terminated as above stated.

In witness whereof, the said The Mechanical Appliance Company has hereunto subscribed its name this 17th day of July, A. D. 1905, subject to the final approval of the Company, at the home office at Milwaukee, Wisconsin, by affixing of the seal of the Company.

THE MECHANICAL APPLIANCE COMPANY,
By F. H. PETRIE.

Approved at Milwaukee, Wisconsin, this 21st day of July A. D. 1905.

T. S. WATSON, *V. P.*

The said agent accepts the within contract upon the terms and conditions named, and agrees to be governed thereby.

Witness his hand and seal this — day of —— A. D. 19—.

DUDLEY SHAW. [SEAL.]

39 In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

STATE OF MISSOURI,
City of St. Louis:

BEN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE CO., a Corp., D'f't.

Dudley Shaw, being first duly sworn, deposes and says that he is a resident of the City of St. Louis, State of Missouri, and is engaged in buying and selling machinery of numerous makes and manufacture; that he maintains an office in the City of St. Louis for the transaction of his business; that he pays the expense of that office and that none of the machine manufacturers whom he represents have any part or interest in that office. Affiant further says that among other manufacturers whose goods he handled, is the Mechanical Appliance Company, of Milwaukee, Wisconsin. That he purchases goods from this concern; that all his purchases are billed direct to him and are paid for by him and he, the said Dudley Shaw, sells and bills direct to his customers. This manner of procedure has obtained since November 1st, 1906, prior to said date he was handling the machinery of the Mechanical Appliance Company under a written contract with it, a copy of which contract is attached to the affidavit of F. H. Petrie, filed in this case. This contract had existed between himself and the Mechanical Appliance Company for some three or four months and under this contract, machinery was billed in most cases, direct to the affiant, and the affiant billed to other parties, the profits on such sales being affiant's compensation for the sale. In some cases affiant took orders from parties and they were billed direct to the parties by the Mechanical Appliance Company.

The above mentioned contract between the affiant and the Mechanical Appliance Company was terminated by mutual consent on No-

vember 1st, 1906, and since that date all transactions between
40 the affiant and the Mechanical Appliance Company have been purchased and sales outright, and he has had no connection with the Mechanical Appliance Company excepting buying and selling their goods. The Mechanical Appliance Company has no interest in my office, pays no part of the expenses, and as far as I know, the Mechanical Appliance Company has never maintained an office in the City of St. Louis or the State of Missouri. Further affiant sayeth not.

DUDLEY SHAW.

Subscribed and sworn to before me, this 2nd day of April, A. D., 1907.

[SEAL.] PIERRE B. KENNEDY,
Notary Public.

My Commission expires July 2nd 1907.

And plaintiff refiled the affidavit of Benjamin T. Castleman, which affidavit in words and figures, is as follows:

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

No. 5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Affidavit of Benjamin T. Castleman, Plaintiff, in Opposition of Motion of Defendant to Quash the Return of the Sheriff Herein.

STATE OF MISSOURI,
City of St. Louis, ss:

Benjamin T. Castleman, the plaintiff in the above entitled cause, being duly sworn, makes oath and says that on and prior to the twenty-ninth day of December, 1906 the day when the sheriff
41 of the City of St. Louis certifies, by his return upon the summons issued in this cause, that he served the same upon the defendant by delivering a copy thereof to the agent of defendant and the person in charge of its business office in the City of St. Louis, he was frequently at Room 1101 of the Chemical Building, in the City of St. Louis aforesaid, in connection with the business out of which this controversy arose.

That upon the office door leading to said room, appeared the name of the "Mechanical Appliance Company;" and that said room and the adjoining room, 1102 Chemical Building, were occupied by Dudley Shaw and the Dudley Shaw Company, said Dudley Shaw representing and acting for said Mechanical Appliance Company in all negotiations which this affiant had with said Company.

Affiant further states that in Gould's Directory of the City of St. Louis for the year 1906, being a directory of the persons residing and doing business in the City of St. Louis, there appears under the letter "M" the following:

"Mechanical Appliance Co. 721 Olive."

That in the directory of the Bell Telephone Company issued in the City of St. Louis in the month of January, 1907, being the month next following that during which service was made on defendant by the Sheriff of City of St. Louis, there appears under the letter "M" the following:

Main 1472 Mechanical Appliance Co. of Milwaukee, Wis., Dudley Shaw Co. Mgr., M'f'rs of Elect- Apparatus Chemical bg."

Affiant further states that he had correspondence with the Mechanical Appliance Company, the defendant herein, both prior to November 1, 1906, the date when, according to the affidavits of F. H. Petrie and Dudley Shaw, filed by defendant herein, it is claimed that Dudley Shaw's contract with defendant was terminated as well as after November 1, 1906, the last of said correspondence being dated December 26, 1906, only three days prior to the service of the summons herein; and that said last mentioned letter was a letter reading as follows:

42 "Mr. Ben T. Castleman, City.

DEAR SIR: We are enclosing you herewith invoice covering *dyes*, tools, etc., which we built in order to manufacture (sic) the Massage instruments for you.

Yours very truly,

THE MECHAN*C*IAL APPLIANCE CO.
DUDLEY SHAW, *Dis. Mgr.*"

And affiant states that said letter so received from defendant was on letter paper which bore printed at its head, the following:

"The Mechanical Appliance Company
Builders of
Watson
Motors and
Generators.
Factory and Main Office,
Milwaukee, Wis."

And bore upon the right of the foregoing heading, the following:

"St. Louis Office:
1101-2 Chemical Bldg.,
Telephone:
Bell: Main 1472
Dudley Shaw, Manager."

Further affiant saith not.

BEN T. CASTLEMAN.

Subscribed and sworn to before me, this 27th day of April, 1907. My term expires April 26, 1909.

[SEAL.] LEO RASSIEUR, JR.,
Notary Public, City of St. Louis, Missouri.

43 And the court, having duly considered said plea to the jurisdiction, denied and overruled the same on the 28th day of May, 1907, on the ground that the return of the sheriff on the summons in this cause, was conclusive upon the defendant, to which action of the court, in overruling its plea to the jurisdiction, defendant duly excepted at the time, which exception was duly allowed by the court.

And at the same term of said court, to-wit, March Term, defendant prayed on the 29th day of May, 1907, that this, its bill of exceptions, may be allowed, settled and sealed.

LEE W. GRANT,
Counsel for Defendant.

Settled and allowed this 29th day of May, 1907.

D. P. DYER, *Judge.*

That thereafter to-wit, on October 21st, 1907, at the September Term of said Court, said cause was called for trial by the court. Plaintiff appeared by his attorney and announced ready for trial; defendant appeared by its attorney and objected to being forced to a trial of said cause on the merits for the reason that this court had acquired no jurisdiction over the person of this defendant by the service of the Sheriff for the same reasons as those set out in defendant's plea to the jurisdiction of the court, heretofore filed in this cause and overruled, which objection was at once overruled by the court, to which ruling an execution was saved by defendant and allowed, and, thereupon evidence was adduced in said cause and the cause submitted to the jury duly impaneled and, on the 22nd day of October, 1907, the jury in said cause returned a verdict in favor of the plaintiff for the sum of Six Hundred Eighty-two Dollars and Fifty cents ($682.50).

At the same term and on the 25th day of October, 1907, defendant filed a motion for a new trial, which motion for new trial was overruled by the court on the 29th day of November, 1907.

44 At the same term of court, to-wit, said September Term, 1907, defendant prayed on the 3rd day of December, 1907, that this, its bill of exceptions, may be allowed, settled and sealed.

LEE W. GRANT,
Counsel for Defendant.

Settled and allowed this 3rd day of December, 1907.

DAVID P. DYER, *Judge.*

O. K.
RASSIEUR, SCHNURMACHER &
RASSIEUR, *Att'ys for Plaintiff.*

45 DECEMBER 9TH, 1907.

5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Now at this day comes said defendant by its attorney and files and presents to the Court its assignment of errors, petition for a writ of error to the Supreme Court of the United States at the City of Washington from the judgment heretofore rendered herein, and appeal bond; whereupon it is Ordered that said Writ of Error issue as prayed, that said bond be approved and that a supersedeas of said judgment be awarded pending the final determination of said writ, and now a certificate touching the question of jurisdiction involved in this cause and a citation citing and admonishing said plaintiff to be and appear in said Supreme Court on or before thirty days from this date are signed by the Judge and filed.

Which said assignment of errors, petition for a writ of error, bond and certificate are respectively in words and figures, as follows, to-wit:

(*Assignment of Errors.*)

In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri. At Law.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Assignment of Errors.

The defendant in this case, in connection with his petition for a writ of error makes the following assignment of errors, which he avers took place during the proceedings prior and at the trial of this cause.

1. The court erred in overruling defendant's plea to the jurisdiction of the court, for the reason, that according to the affidavits filed by the defendant, it appeared that this defendant was not a corporation organized under the laws of the State of Mis-
46 souri, but was a corporation organized under the laws of the State of Wisconsin, and at the time of the alleged service, had no office or place of business in the State of Missouri and was not doing business in the State of Missouri and had no agent in the State of Missouri and because the person served, to-wit: Dudley Shaw was not at the time of said service the agent of this defendant.

2. The court erred in holding that the return of the Sheriff was conclusive upon this defendant in this court, when it appeared from the affidavits filed that the said return was false.

3. The court erred in forcing the defendant to a trial in this

cause when it appeared that this court acquired no jurisdiction over the person of this defendant by reason of the fact that no service of process was ever made upon this defendant.

LEE W. GRANT &
P. B. KENNEDY,
Attorneys for Defendant.

(*Petition for Writ of Error.*)

In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri. At Law.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

Petition for Writ of Error.

The petition of The Mechanical Appliance Company respectfully represents, that on or about the 22nd day of October, 1907, this court entered judgment herein in favor of plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully appear in detail from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in its behalf out of the Supreme Court of the United States for the correction of error complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated,
47 may be sent to the Supreme Court of the United States, that said judgment may be reversed by said Supreme Court of the United States and said cause dismissed.

LEE W. GRANT &
P. B. KENNEDY,
Attorneys for Defendant.

(*Bond.*)

Know All Men by these Presents:

That we, The Mechanical Appliance Company of the City of Milwaukee, State of Wisconsin and United Surety Company are held and firmly bound unto Benjamin T. Castleman in the full and just sum of One Thousand Dollars ($1,000.00) to be paid to the said Benjamin T. Castleman, his heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 5th day of December in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at the September term A. D. 1907 of the Circuit Court of the United States for the Eastern Division of the Eastern

Judicial District of Missouri, in a suit depending in said Court between Benjamin T. Castleman, plaintiff and The Mechanical Appliance Company, defendant judgment was rendered against the said The Mechanical Appliance Company, and the said The Mechanical Appliance Company has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Benjamin T. Castleman citing and admonishing him to be and appear in the Supreme Court of the United States, at the City of Washington, thirty days from and after the date of said Citation.

Now the condition of the above obligation is such, that if the said The Mechanical Appliance Company shall prosecute said writ to effect, and answer all damages and costs if it should fail to make good its said plea, then the above obligation to be void, else to remain in full force and virtue.

48 Sealed and delivered in presence of

THE MECHANICAL APPLIANCE CO.,

[SEAL.]

Per F. H. PETRIE, *Sec.* [SEAL.]

UNITED SURETY COMPANY, [SEAL.]

By JOHN L. MOORE, [SEAL.]

Resident Vice-President.

Attest,

SIDNEY L. CLINGAN, [SEAL.]

Resident Ass't Sec'y.

Approved by

DAVID P. DYER, *Judge.* [SEAL.]

(*Certificate of Judge.*)

In the Circuit Court of the United States, Eastern Division of the Eastern District of Missouri.

BEN T. CASTLEMAN, Plaintiff,

vs.

THE MECHANICAL APPLIANCE COMPANY, Defendant.

Certificate of the Judge.

I hereby certify that in this cause the following question of jurisdiction arose; the defendant filed a plea to the jurisdiction of the court on the ground that it was a corporation organized under the laws of the State of Wisconsin; that it has no office, place of business, or agent in, and was not doing business in the State of Missouri at the time of the service of summons herein and that the person served with the process herein was not the agent of the defendant at the time of said service. Defendant filed affidavit in support of the plea. I overruled the plea on the ground that the facts stated in the return of the sheriff to the summons were conclusive on the defendant and could not be controverted by it. When the cause was called for trial the same objection was made by the defendant and overruled for the same reason. The question only of jurisdiction of the court is,

therefore, hereby certified to the Supreme Court of the United States for its decision thereon.

DAVID P. DYER, *Judge.*

49 (*Memorandum on Plea to Jurisdiction.*)

No. 5409.

BENJAMIN T. CASTLEMAN, Plaintiff,
vs.
THE MECHANICAL APPLIANCE COMPANY, Defendant.

DYER, *J.*

This suit was removed on the ground of diverse citizenship from the Circuit Court of the City of St. Louis to this Court.

Here a motion to quash the return of the sheriff was made on the 19th day of March. After this, to-wit: on the 25th inst. a plea to the jurisdiction of this court was filed. Both motions assign substantially the same grounds.

It is conceded that the return of the sheriff would be good in the Circuit Court of the City of St. Louis, and could not there be attacked by a motion supported by affidavits. That the remedy of the defendant, if any it had, would be against the sheriff on his bond. It is insisted that the defendant in this court has the right to attack the return by affidavits and if the same is found to be false, to have the same quashed.

If this were a new question in this court it might be necessary to give the question a fuller consideration. My immediate predecessor (Judge Finkelnburg) had before him in the case of the First National Bank of Mansfield *vs.* Cella Commission Company practically the same question that is presented by the motion in this case. His decision in that case is authority against the contention of the defendant in this. There should be uniformity in the decisions of this court, and for that reason, if for no other, I must over-rule the demurrer. I fully agree, however, in the conclusions reached by Judge Finkelnburg in that case. The plea to the jurisdiction is overruled.

50 (*Certificate to Clerk.*)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, James R. Gray, Clerk of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true and complete Transcript of the record and proceedings in the cause therein entitled, together with all things concerning the same, as fully as the same remains on file and of record in said cause in

my office; and that the original Writ of Error and Citation are hereto attached and herewith returned.

In Witness Whereof I hereunto set my hand and affix the seal of said Circuit Court at office in the City of St. Louis in said Division of said District on this second day of January A. D. 1908.

[Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.]

JAMES R. GRAY,
Clerk of Said Court.
IRVINE MITCHELL,
Deputy Clerk.

51 [Endorsed:] No. 5409 United States Circuit Court Eastern Division of the Eastern Judicial District of Missouri. Benjamin T. Castleman against The Mechanical Appliance Company Transcript.

Endorsed on cover: File No. 20,956. E. Missouri C. C. U. S. Term No. 236. The Mechanical Appliance Company, plaintiff in error, *vs.* Benjamin T. Castleman. Filed January 4th, 1908. File No. 20,956.

FILED.
MAR 19 1909
JAMES H. McKENNEY,
CLERK.

(20,956)

Supreme Court of the United States

OCTOBER TERM, 1908.

No. [redacted] 48.

THE MECHANICAL APPLIANCE COMPANY,
PLAINTIFF IN ERROR,
vs.
BENJAMIN T. CASTLEMAN,
DEFENDANT IN ERROR.

Statement and Brief of Plaintiff in Error.

LEE W. GRANT and
P. B. KENNEDY,
For Plaintiff in Error.

[redacted] PRINTERS, ST. LOUIS

(20,956)

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 236.

THE MECHANICAL APPLIANCE COMPANY,
PLAINTIFF IN ERROR,
vs.
BENJAMIN T. CASTLEMAN,
DEFENDANT IN ERROR.

STATEMENT.

The sole question in this case is one of the validity of the service upon plaintiff in error, the Mechanical Appliance Company, and therefore of the jurisdiction of the court to try the case upon its merits. The contention of plaintiff in error is that the action of the circuit court in denying to it the right to dispute the truth of the return of the officer serving the process, and in rendering judgment against it, although plaintiff in error was never in fact served with process, was a denial to

plaintiff in error of rights guaranteed to it by the 14th Amendment to the Constitution of the United States.

This suit was brought in the state court by Castleman, a resident of St. Louis, against the Mechanical Appliance Company, a corporation organized under the laws of Wisconsin, and doing business at Milwaukee, and was founded upon an alleged breach of contract, and asked damages in the sum of two thousand, four hundred and twenty-seven and 50/100 dollars ($2.427.50). The return of the Sheriff of the City of St. Louis was as follows:

> "Served this writ at the City of St. Louis, Mo., on the within named defendant, the Mechanical Appliance Company (a corporation), this *29th day of December, 1906*, by delivering a copy of the writ and petition as furnished by the Clerk to Dudley Shaw, agent of the said defendant corporation, he being in said defendant's usual business office and in charge thereof. The president or other chief officer of said defendant could not be found in the City of St. Louis at the time of service." (Trans. Rec.. p. 5.)

The contention of the Mechanical Appliance Company was that Shaw was not its agent, and that it had no office in the City of St. Louis, nor in the State of Missouri. Plaintiff in error in due course filed a petition to remove the cause to the United States Circuit Court. In this petition it stated specifically, that it denied the validity of the service. (Trans. Rec., p. 6.) In the United States Circuit Court the Mechanical Appliance Company appeared specially, and filed a plea to the jurisdiction, alleging that it was a corporation organized

under the laws of Wisconsin; that at the time of the alleged service of the writ by the sheriff, to-wit, *December 29th, 1906*, it did not have an office, agent or a place of business in the City of St. Louis, nor in the State of Missouri; that Dudley Shaw, the person upon whom service was had, was not at that time an officer, agent or employee of said Mechanical Appliance Company. (Trans. Rec., p. 10.) The plea to the jurisdiction was tried on affidavits. The affidavits filed by the Mechanical Appliance Company substantiated fully the allegations of its plea to the jurisdiction. They show that while prior to November 1st, 1906, there was a contract relation between Dudley Shaw, who was a manufacturer's agent selling the products of a number of concerns, and while apparatus of the company's manufacture was sold by Shaw, under a contract which gave to him as his profit the difference between the price at which he sold the apparatus and the price at which it was billed to him by the company, yet, that *after* November 1st, Shaw in no way represented the Mechanical Appliance Company, and that the only dealings between the parties was that he occasionally bought goods outright from them; that at no time had the Mechanical Appliance Company an office in St. Louis, nor did it contribute towards paying the expenses of the office maintained by Shaw, either before or after November 1st, and that since November 1st, the company had not maintained any office of any kind, nature or description in the City of St. Louis or the State of Missouri.

The only affidavit filed by Castleman in opposition was his own affidavit, which stated what was contained on the door of Shaw's office, and on the letter head of a

letter written by Shaw to him, and also certain things contained in the City Directory and that of the Bell Telephone Company, and also that he had negotiations with the company through Shaw in relation to the matters in controversy.

The plea to the jurisdiction was overruled by the court on the ground "that the return of the sheriff on the summons in this cause was conclusive upon the defendant." (Trans. Rec., p. 16.) The court also filed a memorandum. (Trans. Rec., p. 32), saying, "My immediate predecessor (Judge Finkelnburg) had before him in the case of the First National Bank of Mansfield vs. Cella Commission Company practically the same question that is presented by the motion in this case. His decision in that case is authority against the contention of the defendant in this. There should be uniformity in the decisions of this court, and for that reason if for no other, I must overrule the demurrer. (Sic) I fully agree, however, in the conclusions reached by Judge Finkelnburg in that case." It may be remarked *en passant* that the case referred to by the learned Judge was that of a domestic corporation, and not of a foreign corporation. Plaintiff in error then filed its answer, but reserved its exceptions and objections to the jurisdiction of the court. On the trial plaintiff in error appeared by attorney and objected to being forced to a trial for the reason that the court had acquired no jurisdiction over the person of the plaintiff in error for the same reason as that given in its plea to the jurisdiction. These objections were overruled. There was a judgment in favor of Castleman and against the Mechanical Appliance Company.

The certificate of the Judge is as follows:

"I hereby certify that in this cause the following question of jurisdiction arose: The defendant filed a plea to the jurisdiction of the court on the ground that it was a corporation organized under the laws of the State of Wisconsin; that it has no office, place of business, or agent in, and was not doing business in the State of Missouri at the time of the service of summons herein and that the person served with the process herein was not the agent of the defendant at the time of said service. Defendant filed affidavits in support of the plea. I overruled the plea on the ground that the facts stated in the return of the sheriff to the summons were conclusive on the defendant and could not be controverted by it. When the cause was called for trial the same objection was made by the defendant and overruled for the same reason. The question only of jurisdiction of the court is therefore, hereby certified to the Supreme Court of the United States for its decision thereon.

DAVID P. DYER, Judge.

BRIEF.

I.

This appeal is brought to this court because of the constitutional question necessarily involved in its decision, and also because it involves the question of the jurisdiction of the court below; the Supreme Court alone has the power to review the decision upon this question.

Davis, Executor vs. C. C. C. & St. L. Ry. Co. 84 C. C. A. 453, citing, Board of Trade v. Hammond, 198 U. S. 424; U. S. v. John, 155 U. S. 109; St. L. Cotton Compress v. Am. Cotton Co., 60 C. C. A. 80.

II.

In Missouri in an early case, where a resident defendant who had no meritorious defense, (so stated by the Supreme Court) attempted to controvert a false return, the Court held under the authority of an English law book, that this could not be done. At that time the 14th Amendment had not been passed.

Hallowell v. Page, 24 Mo. 590.

That case has been followed by later cases, but the constitutional point was not raised except in the case of Smoot v. Judd, 184 Mo. 508. This last case was decided by the Court in banc. There were thirteen points involved and passed upon by Judge Marshall. The falsity

of the sheriff's return was raised not in the original case, but in a collateral suit to set aside certain sales under the judgment. Smoot had previously sued the sheriff and recovered judgment on account of the false return. The right to controvert the return was not necessarily involved in a decision of the case. Upon an inspection of that decision (Page 580), it will be seen that out of seven judges, only two held the constitutional point not well taken, four judges concurred in the result, indicating either in a separate opinion or by approving certain points only, their reasons; and one judge dissented. The constitutional question therefore is still an open one in that State. This absolute verity attaching to the sheriff's return applies, however, only to the return of the Missouri officer. In a suit on a judgment rendered by a Court of another state, no such verity exists and the falsity of the return of the officer in such other state may be shown.

Eager v. Stover, 59 Mo. 87.

III.

Whatever may be the rule in Missouri, where the cause is removed to the U. S. Circuit Court, the principles which would be applied to test the validity of the service must be such as are approved by the Supreme Court of the United States. For even though sitting in the same state, the United States Courts and the State Courts derive their authority from different governments.

Goldey v. Morning News, 156 U. S. 518.

It was said in a case decided before the 14th Amendment was passed that the state courts were not obliged

to and that the Federal courts would not give effect to a judgment in a state court, unless the state court had lawfully acquired jurisdiction of the defendant even despite recitals in the judgment of the state court of facts, which, if true, would have given it jurisdiction. "The records of the domestic tribunals of England and of some of the States are held to import absolute verity in a collateral proceeding. Public policy and the dignity of the courts are supposed to require that no averment should be admitted to contradict the records. But as we have seen that rule has no extraterritorial force."

Thompson v. Whitman 85 U. S. (18 Wall.) 457.

If the United States court would not give effect to a judgment rendered in the State Court, where no service was in fact had, why should it hesitate to inquire into the fact of service when the cause gets into the Federal Court before a judgment is rendered? The Mechanical Appliance Company could have allowed Castleman to take a judgment by default in the State Court and if suit was subsequently brought either in the Courts of Michigan or in Courts of the United States anywhere, the fact of service could have been inquired into both according to the law as laid down in Eager v. Stover, 59 Mo. 87, or in Thompson v. Whitman, 85 U. S. 457. If the right to inquire into the fact of service is denied the defendant then it is in a worse position than if it had allowed the cause to remain in the State Court.

IV.

Although the principles applying to this case are, we hold, well settled, yet this exact state of facts has come before this court only once and it was there held despite

the return of the officer that the cause must be dismissed because there was no service in fact.

Wabash Western Railway v. Brow, 164 U. S. 271.

In that case the plaintiff brought an action in the Circuit Court of Wayne County, Michigan, against the Wabash Railway to recover damages for personal injuries. Service was had on Fred J. Hill as agent of the company. Thereupon the Wabash Railway in due time filed a petition for removal of the cause to the United States Circuit Court. There was no special appearance filed with the petition for removal nor any motion affecting the service. The railway filed in the Circuit Court of the United States a motion which in effect was a plea to the jurisdiction, setting up that Fred J. Hill, who had been served as the agent of the defendant, was not the agent of defendant, and that defendant did not own or operate any railroad in the State of Michigan, etc., the situation being about the same as that in the case at bar. The motion was denied by the circuit court, and the defendant was forced to trial, which resulted in a judgment against the railway. This court held that as the railway was a corporation which was neither incorporated nor doing business, nor had any agent or property within the State of Michigan, and as the service was made on an individual who was not in any respect an officer or agent of the corporation, therefore the State Court acquired no jurisdiction over the person of the defendant by the service. This principle was so elementary that this court apparently declined to enter into any extended discussion of the subject, and contented itself with a simple announcement of the principle. If that decision states the law, then it follows necessarily that the state court in the case at bar had no jurisdiction over the Mechanical Appliance Company,

and acquired none by the alleged service on Shaw, and so also the Circuit Court of the United States could acquire no jurisdiction, and the ruling of the circuit court below was wrong and its judgment should be reversed.

It will be noted that that case was in Michigan and the rule there seems to be that the return of the officer imports absolute verity.

Johnson v. Mead, 73 Mich., 326.

Green v. Kindy, 43 Mich., 279, although we think this is of no importance.

While no discussion was had in the case of Railway vs. Brow of the principles involved, yet the decision was entirely in line with the previous decisions of this court. Everything that could be said on such a subject had already been fully and thoroughly discussed in other cases.

In the leading case of Goldey v. Morning News, 156 U. S. 518, this court says: "A judgment rendered in a court of one state against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity in the courts of another state or of the United States, unless service of process was made in the first state upon an agent appointed to act for the corporation." Further on (l.c. 522), the court says: "The principle which governs the effects of judgment of one state in the courts of another state is equally applicable in the Circuit Court of the United States, although sitting in the state in which judgment was rendered. In either case, the court, the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from different governments. Citing,

Pennoyer v. Neff, 95 U. S. 714;
St. Clair v. Cox, 106 U. S. 350;
Fitzgerald and M. Construction Co. v. Fitzgerald, 137 U. S. 98;
Re Hohorst, 150 U. S. 653.

The same general principle is also laid down in Lafayette Insurance Co. v. French, 59 U. S. (18 How.) 404. "Whenever an action is brought in one state and a judgment rendered in another, it is not enough to show it to be valid in the state where it was rendered; it must also appear that the defendant was either personally within the jurisdiction of the state or had legal notice of the suit, and was in some way subject to its laws, so as to be bound to appear and contest the suit or suffer a judgment by default. In more general terms, the doctrine of this court as well as the courts of many of the states is that this act of Congress (requiring full faith and credit, etc., to be given its judgments in another state), was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result; nor those rules of public law which protect persons and property within one state from the exercise of jurisdiction over them by another."

We are not discussing in this case what would be the effect of the Missouri rule regarding absolute verity of the return of the officer if this corporation had been a corporation organized under the laws of the state of Missouri, or was a foreign corporation domiciled in Missouri, but this is a case of a foreign corporation which was neither domiciled in Missouri nor doing business there. It appears conclusively from the evidence that not only was this true, but that the person served was not its agent in any sense.

The rule in the State of Ohio in regard to the verity of the return of the officer making process is the same as that in Missouri.

Phillips v. Ellwell, 14 Ohio St. 244.

Yet, notwithstanding this fact, the United States Court in the case of United States vs. American Bell Telephone Company, 29 Fed. Rep. 17, refused to follow that rule, and the return of the marshal made in that case was disputed, and the service set aside. A later case to the same effect is that of Gottschalk Co. vs. Distilling Company, 50 Fed. Rep. 681. To the same effect Forest v. Union Pac. R. R., 47 Fed. 1.

V.

Defendant in error may claim, however, that this Court has decided in Walker vs. Robbins, 14 How. 584, and Knox v. Harshman, 133 U. S. 152, that the fact of service cannot be inquired into. An inspection of these cases, however, will disclose the fact that neither principle which we are now contending for is involved. In both of these cases it appeared that the judgments complained of were rendered at law in the United States Circuit Courts, and subsequently Bills in Equity were filed to enjoin the execution of these judgments. In Walker vs. Robbins, defendants Walker and Puckett prayed perpetual injunction against the judgment at law rendered in the Circuit Court of the United States in Mississippi ten years prior thereto, holding that Walker was never served with process. The return of the Marshal in the original case was personal service. This Court held that the Bill in Equity could not be maintained because Walker had appeared in the action by attorney and had defended. It also held that a Court in Chancery cannot be called on to correct an

abuse of this character, and to vacate a judgment at law. That the defendants' proper relief in case of a false return where the plaintiff at law is not at fault, was *by recourse to the court of law where the record was made.* If relief cannot be had there, then the party injured has his remedy against the Marshal. This Court did not state that the return would have been conclusive upon the defendant if the defendant had in due and proper time set up such defense in the original suit. Even, however, if Walker had not appeared in the original action by attorney and defended, yet doubtless he would not have been allowed to dispute the validity of the judgment after the lapse of ten years, either by appearing in the original suit and moving to vacate the judgment, or by prosecuting a Bill in Equity. The doctrine of laches would certainly apply to a case of that sort.

The case of Knox v. Harshman was a Bill in Equity by the County of Knox against Harshman, asking for a perpetual injunction against the prosecution of a writ of mandamus compelling the judges of the County to levy a tax to pay a judgment rendered to Harshman in the Circuit Court of the United States. The return of the marshal in the suit at law in which judgment was rendered was that fifteen days before the return day he made service on the county by delivering a copy of the petition and summons to Hall, clerk of the County Court. The Bill alleged that neither the county court nor any of the judges had notice of the commencement of the suit until the end of the term at which judgment was rendered. Hall denied that he had ever been served. The Bill was dismissed. This Court says that the proofs given at the hearing clearly showed that service was in fact made, even if the question of the truth of the re-

turn could be considered as open in the Bill in Equity. This Court further held that a Court of Equity would not interfere with judgments at law unless the complainant had an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud, or accident, unmixed with the negligence of himself or his agents. That if in fact the Marshal's return was false, redress could be sought at law only and not by a Bill in Equity. This Court does not say in that case that if, in fact, which it was not, the return had been untrue, that the County of Knox in the suit at law would not have been entitled to appear in the original action and to file a motion to vacate the judgment because of the falsity of the return. As it held that the proof given at the hearing clearly showed that service was in fact made, this Court might have contented itself with simply dismissing the bill on its merits as did the court below. In going further, however, it simply said that the County had mistaken its remedy. In no case has it ever been decided by this Court that the Marshal's return is conclusive in the original action. Even if such a doctrine had been laid down by this Court, it would not decide the case at bar, because we hold that it would not necessarily apply to the facts involved in this case, which originated in the state court, and was afterwards removed to the Federal Court.

VI.

As has been stated above, it is the rule both in Missouri and in the United States Courts, that where judgment has been recovered in the state court and a suit afterwards brought upon that judgment in the courts of another state, or in the Circuit Court of the United

States, either in that state or elsewhere, the validity or truth of the service had in the original case may be inquired into. The question whether the truth of service may be inquired into in the original case is not the same in all the states. As has been said by this court, the courts of some of the states and of England require that no averment shall be admitted to contradict the return of the officer making the service. The weight of authority, however, of these decisions in the state courts is that the truth of such return may be inquired into in some proceeding or other, even if the plaintiff in the original action was not acting in collusion with the officer in making false return.

Judge Valliant, (page 611), in his dissenting opinion in Smoot vs. Judd, 184, Mo. 508, gives a list of cases in the several states holding that the truth of the return may be inquired into in one way or another. It would serve no good purpose we think to swell this Brief with such a list. Many others might be added.

Where an officer makes a false return and in the enforcement of the judgment that follows sales of property take place and innocent parties acquire title, it may be that after the lapse of time it would be unequitable to allow the original defendant to have the judgment set aside and thereby divest title to the property from innocent purchasers; but, when the non-resident defendant appears specially in the original action before judgment and denies the truth of the officer's return, the doctrine that he is concluded by the return must be shocking and offensive to the conscience of every right minded person, and certainly is contrary to the mandate of the Constitution, which guarantees that the property of no one shall be taken from him except by due process of law.

We need not discuss here whether the court might be justified in compelling a resident defendant to seek a remedy for a false return by an action in damages on the bond of the officer based upon the fact that the court had jurisdiction over the person of the defendant because of his being domiciled there. However that may be, it seems that in this case where the defendant was not a Missouri corporation, was not domiciled in Missouri, had never taken out a license in Missouri, had never done business in Missouri, and in fact was not doing business in the State of Missouri at the time of the service, and had no office or agent there, and that Dudley Shaw, the person upon whom service was had, was not in fact its agent in any sense at the time of the service, that therefore the state court could not in any way acquire jurisdiction over the person of the defendant; that the holding of the circuit court below that the state court did acquire jurisdiction over the person of the defendant by reason of the false return made by the marshal, was clearly contrary to the Fourteenth Amendment, and also contrary to "that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result, and those rules of public law which protect persons and property within one state from the exercise of jurisdiction over them by another." (Lafayette Ins. Co. vs. French.)

We respectfully submit, therefore, that the judgment should be reversed and the case dismissed.

LEE W. GRANT and
P. B. KENNEDY,
For Plaintiff in Error.

(20,956)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 48.

THE MECHANICAL APPLIANCE COMPANY,
Plaintiff in Error,

vs.

BENJAMIN T. CASTLEMAN,
Defendant in Error.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

RASSIEUR, SCHNURMACHER & RASSIEUR,
and
BEN. T. CASTLEMAN,
For Defendant in Error.

(20,956)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.
No. 236.

THE MECHANICAL APPLIANCE COMPANY,
Plaintiff in Error,

vs.

BENJAMIN T. CASTLEMAN,
Defendant in Error.

Statement, Brief and Argument
For Defendant in Error.

Plaintiff in error, a Wisconsin corporation, maintained a business office at St. Louis, Mo., was engaged in business in the state of Missouri, and this suit was brought in the state court at St. Louis, for breach of a contract made by it in Missouri, with a citizen of that state, through the agent served with process, and service was regularly had on it.

The statutes of Missouri, 1899, Section 570, provide for service in such cases as follows:

"Where defendant is a corporation organized under the laws of any other state or country, and (a) having an office or (b) doing business in this state, (1) by delivering a copy of the writ and petition to any officer, or agent of such corporation or company in charge of any office or place of business, or (2) if it have no office or place of business then to any officer, agent, or employe in any county where such service may be obtained, etc."

The petition (R. P. 3) contains the following allegation, "Plaintiff states that defendant is ..... doing business in the State of Missouri, having its business office in the City of St. Louis in said state." The petition was filed the 28th day of January, 1906 (R. P. 3), and issued on, and served on plaintiff in error January 29th, 1906 (R. P. 5). The return (R. P. 5) shows that the writ and petition were served on plaintiff in error, "By delivering a copy of the writ and petition as furnished by the clerk, to Dudley Shaw, agent of the said defendant corporation, he being in said defendant's usual business office and in charge thereof, etc."

The cause was removed from the State to the Federal Court, and on the 25th day of May, 1907, plaintiff in error filed what is styled a motion and plea to the jurisdiction (R. P. 10), setting up that it did *not* have an "agent, office, or place of business in the state of Missouri" and that "Dudley Shaw was not an agent, officer or employe of defendant." No demurrer was filed to this plea, no evidence was offered in its support and the court on the 29th day of May, 1907, (R. P. 16) overruled the plea, "On the ground that the return of the sheriff on the summons in this cause, was conclusive upon the defendant."

Affidavits appear to have been *filed* on both sides (R. PP. 10-16) but they were not before the court, nor called to the attention of the court; the allegation in the petition that plaintiff in error was doing business in the state of Missouri, was not denied.

On June 28, 1907, (R. P. 16, 17) plaintiff in error filed an answer, joining issue on the facts set forth in the petition of defendant in error, *inter alios,* that it had an office in the City of St. Louis, and was doing business in Missouri; setting up a waiver by defendant in error, of any alleged breaches on the part of plaintiff in error of the contract sued on, and insisting that the contract was in full force and effect.

The jury found in favor of defendant in error (R. P. 19) and judgment was rendered accordingly; the questions of "having an office and doing business" in the State of Missouri, are, therefore, *res judicata.*

The certificate of the question to this court (R. P. 31), shows affirmatively the question is not jurisdictional, but is an ISSUE OF FACT, on a QUESTION OF AGENCY, raised by plea; which does not involve the jurisdiction of the circuit court, as a Federal Court, but is simply matter of abatement at common law, and this court has no jurisdiction of this error.

This cause is before the court by writ of error, and since the plea was not demurred to, the decision of the court was on the question of agency—a question of fact which this court will not review.

"An appeal is a process of civil law origin, and removes a cause entirely, subjecting the facts as well as the law to a review and retrial; but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law." Wiscart v. Dauchy, 3 Dall. 327. Facts not reviewed in writ of error, Dower v. Richards, 151 U. S. 664-5. "A writ of error is a common law process and removes nothing for a re-examination but the law."

Ex Parte Crane, et al, 5 Peters 199, 205.

Pleas to the writ, of matters apparent on the face or dehors the writ, are in *abatement,* Chitty on Pleading, PP. 456, 464.

If the original process were exhausted, a new summons could issue; the jurisdiction is not affected by improper service. "But it is not proper to dismiss the suit because of this void service. The most that should be done is to set aside and vacate the service.....There is no penalty attached to defective service that the suit should be dismissed. It is enough to set it aside." Brooks v. Dun 51

Fed. 148, and say the court in this case, "In Harkness v. Hyde, 98 U. S. 476, the Supreme Court went no further than to order that the service be set aside."

"By the judiciary act of March 3rd, 1891, c. 517, 26 Stat. 826, an appeal or writ of error, as the one or the other mode may be proper, can be taken directly from a circuit court to this court in certain specified cases, among which is, "any case in which the jurisdiction of the court is in issue;" and in such cases the question of jurisdiction alone should be certified to the Supreme Court from the court below for decision. In all cases, other than those specified in Section 5 of that act, the Circuit Court of Appeals is given appellate jurisdiction. The question presented by the certificate of the circuit court is not one of jurisdiction within the meaning of the 5th section of the act of 1891, and the jurisdiction of that court was not in issue. There was diversity in the citizenship of the parties to this suit instituted by Stuart R. Knott as a citizen of Missouri and no question was raised or could be raised, as to the authority of the circuit court, as a Federal court, to take cognizance of it.....In all this, there was nothing involving the jurisdiction of the circuit court, as a Federal Tribunal, whose jurisdiction is regulated by acts of congress. The question of jurisdiction which the statute permits to be certified to this court directly, must be one involving the jurisdiction of the circuit court *as a Federal Court*. PP. 232-3..... When the requisite citizenship of the parties appears, and the subject matter is such that the circuit court is competent to deal with it, the jurisdiction of that court attaches. P. 234.....If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the Circuit Court of Appeals. The issue presented did not raise any question under the constitution or statutes of the United States and depended only upon principles of *general law* applicable *to all courts*.....We repeat, that the jurisdiction of the circuit court was not and is not questioned for

want of power in that court as a Federal Tribunal. Appeals or writs of error may be taken directly from the circuit court to this court in cases in which the jurisdiction of those courts is in issue, that is, *their jurisdiction as Federal Courts.*" P. 235. Louisville Trust Co. v. Knott, 191 U. S. 232-235 and cases cited U. S. v. Larkin 208, U. S. 338, Mex. Cent. R. Co. v. Eckman, 187 U. S. 432.

There is in this case no (a) jurisdictional question (b) or question of law or (c) fact (d) properly raised or (e) certified before this court.

The affidavits set out in the transcript were simply filed, could not become a part of the record until made so by bill of exceptions, were never offered in evidence, and it was never insisted that the court should give them due effect as evidence, and they are not now before this court.

"Affidavits, depositions and matters of parol evidence, though appearing in the transcript of the proceedings of a COMMON LAW COURT, do not form part of the record unless they are made so by bill of exceptions, by a special verdict, or a demurrer to the evidence." Baltimore & Potomac R. R. Co. v. Trustees, etc., 91 U. S. 127, 130.

"Exceptions may be taken by the opposite party to the introduction of depositions or affidavits; and the party introducing such evidence in a subordinate court may insist that the court shall give due effect to the evidence, and in case of refusal to comply with such a request, may except to the ruling of the court, if it be one prejudicial to his rights. *Where neither party excepts to the ruling of the court, either in respect to its admissibility or legal effect, the fact that such a deposition or affidavit is exhibited in the transcript is not of the slightest importance in the appellate court, as nothing of the kind can ever constitute the proper foundation for an assignment of error.*" Balt. & C. R. Co. v. Trustee ante 130.

"The affidavits, copies of which appear in the transcript, form no part of the record proper. The mere fact

that a paper is found among the files in a case does not of itself make it a part of the record. If not a part of the pleadings or process in the cause, it must be put into the record by some action of the court. It nowhere appears that the affidavits were ever brought to the attention of the court, much less that they constituted the evidence on which the ruling was made. Neither is the opinion of the court a part of the record." England v. Gebhardt, 112 U. S. 505, 6.

"Questions of whatever nature not raised in the trial court, will not be noticed on appeal." Walker v. Sauvinet, 92 U. S. 90; McDonald v. Smalley, I. Pet. 620.

"Evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record unless made so by some regular proceeding AT THE TIME OF THE TRIAL, AND BEFORE THE RENDITION OF JUDGMENT." Duncan v. Atchison T. & S. F. R. Co., 72 F. 812.

There is just as much show of reason, for urging that the verdict of the jury was before the trial court, as to contend that papers on file entered into the decision of the plea. "In the first place, only errors apparent on the record can be considered, and an affidavit filed for use on a motion *is not a part of the record* any more than depositions of witnesses used on the trial, and only become a part of the record by being incorporated in a bill of exceptions. In the second place, there is nothing to show that this was the only affidavit. The certificate of the clerk is simply 'That the foregoing folios from 1-13 contain true and faithful transcripts from the records and files of said court in the case of, etc. .....This certificate may be true, and yet a dozen affidavits contradicting the statements in this may have been filed and used on the motion. THE RECORD IMPORTS ABSOLUTE VERITY; an AFFIDAVIT of a witness DOES NOT." Evans v. Snettnisch, 149 U. S. 607; Stewart v. Wyo. Ranchl Co., 128 U. S. 390. And likewise, of the certificate in this case, for aught that appears, any number

of matters *in pais* may have been before the court for consideration, not of record, and not included in a bill of exceptions, nor matter even of exception.

The court says (R. P. 31) "Defendant filed affidavit in support of plea. I overruled the plea on the ground that the facts stated in the return of the sheriff were conclusive on the defendant and could not be controverted by it;" no attempt appears to have been made to use the affidavits, and there was nothing the court could do, but sustain the return; there was nothing shown against it, and there is nothing before this court against it.

But whether these affidavits were before the court or not, the action of the court could not be assigned as error. "Ex parte affidavits rank in equal grade with hearsay testimony, and in the absence of any statute or rule of court expressly authorizing it, such affidavits can never be admitted in evidence to prove the truth of facts directly in controversy, unless read by consent or without opposition when such opposition might have been made." 2 Cyc. 35-6; Noble v. U. S., Dev. Ct. Cl. Rep. 83.

"The affidavits of persons who are competent witnesses are inadmissible in evidence." Patterson v. Fagan, 38 Mo. 70, 82. "The fact that an affidavit was part of the files in the case did not change its character nor make it competent evidence." Quinn v. Rawson, 5 Ill. App. 130.

By the plea (R. P. 10), it was admitted, as alleged in the petition, (R. P. 3) that on the 28th day of January, 1906, the date of filing the petition, the plaintiff in error was doing business in the State of Missouri, since this allegation was not denied by the plea; hence it was never denied that plaintiff in error, was within reach of process of the courts of the State of Missouri; moreover, the allegations of the petition (R. P. 3) as to doing business and maintaining an office, in the City of St. Louis, State of Missouri, were traversed after the decision on the plea, by putting these facts

in issue by the answer (R. PP. 16-17) on the 28th day of June, 1907, thereby waiving any error of fact thereon, and any right to insist on any error in the ruling on the plea, by the court, and thereafter, (R. P. 19) on the 22nd day of October, 1907, the jury found the issues in favor of defendant in error, and judgment was rendered accordingly, and the issue as to maintaining an office was waived; and the issue as to doing business admitted as aforesaid, were both found against plaintiff in error; and are *res judicata;* and this is a collateral attack on this judgment on the merits; the fact of doing business, which alone would give the court perfect jurisdiction, was never before denied, and was found against plaintiff in error; neither was the relation of the agent to third parties, or the question of ostensible agency ever questioned, both of which would authorize valid and lawful service (a) at common law, and (b) under the statute.

"By taking a case directly to this court on the question of jurisdiction, the contention on the merits would be waived." U. S. v. Jahn, 155 U. S. 113.

There is an attempt to confer jurisdiction on this court, by a pretended "Constitutional question;" this cannot be done, because, the result did not depend thereon; no right claimed under the constitution, was either raised, appears on the record, or is assigned as error; such a question must be controlling, presented to the court, and of course determined by court and considered by it.

"The fundamental question of jurisdiction, first of this court, and then of the court from which the record comes, presents itself on every writ of error and appeal, and must be answered by the court, whether propounded by counsel or not. Where a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a

suit arising under the constitution or laws; and it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States before jurisdiction can be maintained on that ground." Defiance Water Co. v. Defiance, 191 U. S. 184; Lefkowitz v. Foster Hose Supply Co., 161, F. 376.

"In order to hold this appeal (writ of error here) maintainable as within the second of the above named clauses (the 4th class in the enumeration of the statute) the construction or application of the constitution of the United States must be involved as controlling, although on appeal or error all other questions would be open to determination, if inquiry were not rendered unnecessary by the ruling on that arising under the constitution..... The bill before us, refers to the provision of the constitution upon which complainant relied to invoke the action of the court in vindication of their supposed rights, or which was presented to be construed or applied by the court. No question upon such construction or application was raised between the parties upon the record, or determined by the decree of the court..... In passing on the validity of that decree (plea here) the circuit court decided no question of the construction or the application of the constitution and as we have said, no such question was raised for its consideration." Casey v. Houston & T. C. R. Co., 150, U. S. 181.

"Cases in which the construction or application of the constitution is involved, or the constitutionality of any law of the United States is drawn in question, are cases which present an issue upon such construction, or application or constitutionality, the decision of which is controlling." World's Columbian Exp. v. U. S., 6 C. C. A. 58, 71.

"A case may be said to involve the construction or application of the constitution of the United States where a

title, right, privilege or immunity is claimed under that instrument. A definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision." Ansbro v. U. S. 159, U. S. 697-8.

"Following the rule of the state courts, a federal court of Pennsylvania will not receive extrinsic evidence to impeach the return of a marshal which is good on its face. in support of a motion to set it aside." Trumble v. Erie Elec. Mot. Co., 89, F. 51, 2; Wilson v. Hurst, Pet. C. C. 441; Fed. Cas. 17, 809; U. S. v. Lotridge, I. McLean, 246; Fed. Cas. No. 15, 628.

"The return of the marshal, thus constituting upon its face a lawful one, the question before us is, can the defendant be permitted to contradict it, and aver that it is a false return? An examination of the cases shows that in Pennsylvania this cannot be done. If the return on its face is good, the court will not receive extraneous evidence to contradict it. If the facts stated in the return are false, *the plaintiff's remedy is by action against the officer for false return.* The general rule as to the return of a Pennsylvania officer would apply to the marshal of this district." Trumble v. Erie Elec. Mot. Co., 89, F. 52.

"The court has no hesitancy in saying, that the defendant cannot in this way, impeach the return of the marshal, and that *it must be taken as true.* If the marshal, or his deputy, has made a false return, the remedy must be by an action at law." U. S. v. Lotridge, et al., I. McLean 247; Wilson v. Hurst, Fed. Cas. No. 17, 809.

The law in Indiana is that a sheriff's return is conclusive. The Federal Courts sitting in Indiana, are bound by this law of the state. Joseph v. N. Alb. S. F. & R. M. Co. 53, F. 180.

The federal courts sitting in Missouri have followed this law of the state. Bank v. Cella Commission Co.

This is the undisputed law of Missouri, and of the Supreme Court of the United States as well.

"In case of a false return affecting the defendant, when the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made, and if relief cannot be had there, the party injured must seek his relief against the marshal." Walker v. Robbins, 14 How. (U. S.) 584, 5.

"The officer's return stated that he served a copy of the summons upon the clerk. If that return were false, yet no fraud being charged or proved against the petitioner, redress could be sought at law only, and not by this bill." Knox v. Harshman, 133 U. S. 152, 156, *cited in the latest Missouri case on the question, where all the authorities are reviewed.* Smoot v. Judd, 184, Mo. 520, 21; 568.

"Removal is a change of venue. Not an appeal." Davis v. St. Louis S. F. Ry. Co., 25 Fed. 786, 788-9.

Wherever this question has been squarely presented, the courts of the United States have followed the laws of the states, both substantive, and on matters of evidence and practice; and the statements in the brief of plaintiff in error, are not true in fact or in law, *post.*

The question of public policy, of which *post,* affords an additional ground against the unprecedented and unreasonable contention of plaintiff in error.

"Whatever belongs to the three categories of practice, pleading and forms and mode of procedure, must conform to the state law and the practice of the state courts, except when congress itself has legislated upon the particular subject and prescribed a rule—*There can be no doubt, we think, that the mode of service of process is within the categories named in the act.* It is part of the practice and mode of proceeding in a suit." Amy v. Watertown No. 1, 130 U. S. 304.

"The provisions of the state law as to the sufficiency of the service of process are embraced by this section." Hat-Sweat Manfg. Co. v. Davis Sewing Mch. Co., 31, Fed. 294.

"The laws of the state providing for the service of process of the state courts in actions at law furnish the rule for procedure in such cases in this court, so that whatever would be lawful service of process to bring a party into court, if the action were in a court of competent jurisdiction under the state government, is lawful and sufficient for the purpose in actions commenced in this court." VanDresser v. Ore. Ry. & Nav. Co., 48 Fed. 205.

"The courts of the United States upon removed cases have no wider jurisdiction than have the courts of the state from which they were removed. The removal simply transfers the hearing from the state to the national tribunal, but does not enlarge the right of the court to hear the cause." Swift v. Phil. & R. R. Co., 58, F. 861; Fidelity Trst. Co. v. Gill Car Co., 25 Fed. 736-741; Elliott v. Shuler 50 F. 457; Rosenbaum v. Council Bluffs Ins. Co., 37 Fed. 9; Bills v. N. Orleans & G. R. Co., 3 Fed. Cas. No. 1409.

(a.) Except where and when denied by the answer, it has always stood admitted upon the record of the proceedings, that plaintiff in error, was doing business in Missouri. (b.) The plea alleges, that "defendant did not have any agent, office or place of business.....was not and had not been for some time prior thereto, an officer, agent or employe."

These matters are now *res judicata;* and, supported by the officer's return, and as to time, (a.) of the plea, and (b.) final judgment; and at time of plea, the facts of the return were traversed; but it was admitted that plaintiff in error was then doing business, and had engaged the SUBJECT MATTER OF THE CONTRACT, in Missouri, but denied the person served was its agent, or that it had a place of business in Missouri; but it was neither denied that there

was a place PURPORTING to be its place of business, nor that the agent WAS HOLDING HIMSELF OUT AS ITS AGENT; and it is obvious, a REPLEADER would be awarded, upon final judgment, on such an immaterial issue, if it had been found against respondent, though it was not; moreover it is *res judicata*, that plaintiff in error was doing business and maintaining an office; and the return shows that the person served was its agent, and there is nothing in this record, raising any question as to these matters, which are conclusive; this court, as we have seen, (a.) will not go into the facts; (b.) they are not jurisdictional; (c.) any conclusion of fact or law, other than that sought to be altered, would do violence, *collaterally*, to conclusive portions of the record: (d.) the admitted facts uphold both jurisdiction and service; and (e.) the facts not only uphold the court's action, but warrant no other.

The return to the writ, is neither void nor voidable, but regular as matter of law upon the facts.

"Neither do we mean to assert that a state may not require a non-resident entering into a partnership or association within the limits or making contracts enforceable there, to appoint an agent or representative in the state, to receive service of process, and notice in legal proceedings instituted with respect to such partnership, association or contracts, or to designate a place where such service may be made and notice given; and provide upon their failure, to make such, or to designate such place, that service may be made upon a public officer designated for that purpose *or in some other prescribed way*, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the state. As was said by the Court of Exchequer in *Vallee v. Dumergue*, 4 Exch. 290, 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though

he may not have actual notice of them.'" Pennoyer v. Neff, 95 U. S. 735.

The contract, for breach of which this suit arose, was a Missouri contract; the laws of that state formed a part thereof, and plaintiff in error is deemed to have assented to those laws, and the means of redress for breaches of duty (contract) arising by virtue of those laws; no notice of revocation was ever given to defendant in error, who had all dealings with the agent; and there was a negligent holding out, which gave rise to the law of estoppel, creating an agency IN LAW. Engaged in business in a state, and having an AGENT IN LAW, are quite sufficient; it is held having insurance policies outstanding, constitutes doing business; an agency in law may arise, where there is no agency in fact, (a.) from clothing the agent with the *indiciae* of agency—ostensible agency, and (b.) from his prior dealings with third persons and continuing to hold himself out as such, to third persons.

Plaintiff in error is estopped from asserting rights not accorded to citizens of Missouri; there is great difficulty in determining these questions of agency, depending on many surrounding facts and inferences; the law will imply authority under a statute if fair, reasonable and just; the right to sue the corporation, through the agent, cannot be terminated by the principal; immunity from liability is not contemplated; and the law makes the appointment; this was an agency IN LAW, and the service was good both (a) at common law (b) and under the statute

Plaintiff in error is liable both for failure to give notice of revocation, and for negligent assisted misrepresentation, upon its own showing and the undisputed facts.

"If a corporation of this state establishes an agency in a foreign state.....the company recognizes the laws of that state, and is bound by process served upon its agent *at any time before the suitor has notice of the determination*

of such agency.....The rule is thus stated by Justice Story: As to the agent himself, the revocation takes effect from the time when the revocation is made known to him; as to third persons, when it is made known to them, AND NOT BEFORE. Until, therefore, the revocation is made known it is inoperative. If known to the agent, as against his principal, his rights are gone; but as to third persons, who are ignorant of the revocation, his acts bind both himself and his principal. This is but another application of the known maxim of law and equity, that where one of two innocent persons must suffer, he should suffer, who by his confidence, or silence or conduct, has misled the other. *Story on Agency, Section 470.* Chancellor Kent states the rule with equal clearness and precision. Even if the notice (of revocation) had reached the agent, and he concealed the knowledge of the revocation from the public, and the circumstances attending the revocation were such that the public had just ground to presume a revocation, his acts done under his former power would still be binding upon his principal. 2 Kent's Com. 644. * * * But it is insisted that * * * the office of the agent extends only to the remedy of third parties, and not to the creation of rights; * * * if it be true, as suggested by Justice Story, that the rule is but another application of the known maxim, that where one of two innocent persons must suffer, he shall suffer who by his confidence has misled the other, this case would seem to fall strictly within the reason of the principle." Capen v. Ins. Co., 25 N. J. Law 67, 70; 1 Clark & Skyles Law of Agency p. 426.

"After it has appointed an agent in a particular business, parties dealing with him in that business have a right to rely upon the continuance of his authority until in some way informed of the revocation." Ins. Co. v. McCain, 96 U. S. 86; Johnson v. Christian, 128 U. S. 374, 6; Tiffany on Agency, pp. 38, 138.

The uncontroverted facts in the transcript, disclose a

clear case of "Ostensible agency," under the broad and universal principles of the common law, the binding force of which, depends not at all upon the FACT but what third parties have BEEN LED TO BELIEVE, and have ACTED ON TO THEIR INJURY. Ewart on Estoppel by Misrepresentation pp. 139, 483, 491, 521, and auth. cited.

Were this an appeal, the action of the trial court would be amply sustained by the *facts,* which fully uphold the action of the court below. "If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done process shall be served upon its agents, the provision is to be deemed a CONDITION of the permission, and corporations that SUBSEQUENTLY do business in the state, are to be DEEMED TO ASSENT to such conditions as fully as though they had specially authorized their agents to receive service of process." St. Clair v. Cox, 106 U. S. 356.

"Process cannot be served upon the officer of a corporation in a foreign jurisdiction because he does not carry his official character and functions with him. The corporation, it is true, was drawn into the forum of a foreign sovereignty to litigate, but having voluntarily entered that jurisdiction and transacted business therein; having invoked the comity and the protection of the laws of that sovereignty for their own benefit—can they complain that the contracts there made are enforced within that sovereignty and in accordance with its laws? Does it involve the violation of any principle of natural justice, or that protection which is due to the citizens of our own state? If the corporation were carrying on its business within the state of New York (here Missouri) at the time of the service of the process, the court has already intimated its opinion that the service would be valid.....I think under such circumstances, natural justice requires that corporations should be subject to the laws of the state whose comity they thus invoke. *For*

the purpose of being sued, they ought to be regarded as voluntarily placing themselves in the situation of citizens of the state. And such it seems would be the rule, independently of any express statute authorizing the mode of serving process. Angell & Ames Corporations, Section 402. The fact that the corporation had ceased to transact business, whatever technical difficulty it may seem to create, cannot alter the reason and justice of the proceeding." Moch v. Va. Fire & Mar. Ins. Co., 10 Fed. 701-2.

"If it do business, it will be deemed to have consented, and will be bound accordingly." Id. 703; R. R. Co. v. Harris, 12 Wall. 65, 81; Ry. Co. v. Whitton, 13 Wall. 270; Ex parte Schollenberger 96, U. S. 376.

"In a suit where no property of a corporation is within the state, and the judgment sought is a personal one, it is a material inquiry to ascertain, whether a foreign corporation is engaged in business within the state.....and if so, the service of process must be on some agent so far representing the corporation in the state that he may properly be held in law an agent to receive such process in behalf of the corporation. An express authority to receive process is not always necessary..... Its outstanding policies (contracts here) were not affected thereby (by ceasing to solicit new business). Having succeeded in taking risks (making contracts here) through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies (contracts) while at the same time its old policies (contracts) continue in force. This action on the part of the company constitutes doing business within the state, so far as is necessary, within the meaning of the law upon this subject, and this business was continuing at the time of service of process." Mut. L. Ins. Co. v. Spratley, 172 U. S. 610-11.

"The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority to him, and *if he be that kind of an*

agent the implication will be made notwithstanding a denial of authority on the part of the other officers of the corporation." P. 615. (Cited in Board of Trade v. Hammond, 198 U. S. 438.)

"It is sufficient to observe that we are of opinion that when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment that it should appear somewhere in the record—either *in the service* or *the pleadings* or in *the findings of the court*—that the corporation was engaged in business in the state. The transaction of business in the state GENERAL OR SPECIAL appearing, and certificate of service of process by the proper officer on a person who is its agent there, would be sufficient prima facie evidence that the agent represented the company in the business. It would seem to be open when the record is offered in evidence in ANOTHER STATE, to show that the agent stood in no representative character to the company; that his duties were limited to a particular transaction; or that his agency had ceased when the matter in suit arose. In the state where a corporation is formed, it is not difficult to ascertain who are authorized to represent and act for it. But the moment the boundary of the state is passed, difficulties arise; it is not so easy to determine who the representatives of the corporation are and under what circumstances service on them will bind it." Mut. L. Ins. Co. v. Spratley, 172 U. S. 616.

"In the absence of express authority, the question depends upon a view of the surrounding facts, and upon the inferences which the court might properly draw from them. If it appear that there is a law of the state in respect to the service of process on foreign corporations and that the character of the agency is such as to render it fair, reasonable and just to IMPLY an authority on the part of the agent to receive service, the LAW WILL and ought to DRAW SUCH AN INFERENCE and to IMPLY SUCH

AN AUTHORITY, *and service under such circumstances and upon an agent of that character, will be sufficient.*" Id. 617.

"Continuing to do business, the company impliedly assented to the statute, at least to the extent of consenting to the service of process upon an agent so far representative in character that the law would imply authority on his part to receive such service within the state. When the service of which plaintiff in error complains was made, the company had never appointed an agent. There was, therefore, no one upon whom process could be served (under the Stat.). A vast mass of business is now done through the country by corporations which are created by states other than those in which they are transacting business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the state where business was done, OUT OF WHICH THE DISPUTE ARISES..... When this suit was commenced, if theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another state. In many instances the cost of the remedy would have largely exceeded the value of the fruit. In such suits local in their character both at law and in equity, there could be no relief. The result would be to a large extent, IMMUNITY from all legal responsibility. The court in view of these facts, was of opinion, that congress intended no such result." Id. 619-20.

In re Moch v. Ins. Co., it was held that the right existed to sue a non-resident corporation, through a resident agent, though his agency had been terminated BY HIS EMPLOYER, and say the court, "this right could not be destroyed by a revocation of the powers of an agent previously to suit." 10 Fed. 703.

"The object of this statute (S. 570 R. S. '99) is to bring foreign corporations who do business in this state within the reach of process here, so that a citizen dealing with it or brought into contact with it and having any affair to settle with it in court, need not be sent out of the state to prosecute his suit. It is a statute, that in a certain sense, is rather repugnant to what might be presumed to be the foreign corporation's preference in the matter. No one desires to be sued, and corporations are not different from individuals in that respect. Therefore, if we should depend on the voluntary action of a corporation to appoint an agent here to receive service of process, it is probable there would be no one appointed. *For that reason, the law makes the appointment, and designates as the agent for that purpose the agent through whom the corporation transacted its business here.*" Newcomb v. R. R., 182 Mo. 705-6.

In those states which permit the sheriff's return to be traversed, if this court was vested with power to review the facts, the action of the trial court would not be disturbed, even though this were a jurisdictional question: "The return is a part of the record of the case." Alderson on Jud. Writs. & Proc., P. 569, citing many cases.

"There is excellent authority for the position that the return *is conclusive as* to the parties to the action." Murfree on Sheriffs, Section 868.

"It is a maxim of law, that there can be no averment in pleading against the validity of a record, though there may be against its operation." U. S. v. Gayle, 45. F. 107.

"In whatever form the impeachment of a return is presented, it requires the clearest and most satisfactory evidence to overcome the statements there made under the sanction of official oath and responsibility." 18 Pl. & Pr. 984; Alderson on Jud. Writs & Proc., P. 582; Murfree on Sheriffs 2nd Ed. by McQuillin, 866-68; 866a-868a.

"Notwithstanding there is corroborating testimony on behalf of the person attacking the return, the decision of the

lower court in support of the return will not be disturbed in the appellate court, unless it appears to be palpably erroneous." 18 Pl. & Pr. 986 and cas.

"The testimony of the defendant himself is not sufficient to enable the court to say that the lower court erred in refusing to set aside the return." Alderson P. 582 and cas.

All the cases in seeming conflict, including those cited in the brief of plaintiff in error, upon investigation, it will be found either that the case was brought to this court by APPEAL, the facts being conceded or uncontroverted; or brought here by the plaintiff, the jurisdiction below being denied, or the issue being of law only. But here there is presented an isolated question of fact, which cannot be reviewed by writ of error; nor could it be by appeal, nor in any manner, nor before any court, on this record. The law of the State of Michigan, is not as stated (see Lane v. Jones, 94 Mich. 540, and Alderson on Judicial Writs and Process, P. 572 and cases cited). Neither is the law of Missouri impaired.

In the leading case of U. S. v. Jahn, 155 U. S. pp. 112-13, the court say: "If jurisdiction were sustained and the merits adjudicated, although the question of jurisdiction MIGHT be brought up directly, the Circuit Court of Appeals would UNDOUBTEDLY have jurisdiction to review the case upon the merits, the requirement that the question of jurisdiction should be certified for decision was intended to operate as *a limitation* upon the jurisdiction of this court and of all questions involved in it."

The judgment below should be affirmed.

RASSIEUR, SCHNURMACHER & RASSIEUR,
and
BEN. T. CASTLEMAN,
For Defendant in Error.